Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-708

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL,

Petitioner,

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCALS 1349, 1357, 1358, 1360, 1361, 1371 and 1393,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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The Philadelphia Food Store Employers' Labor Council petitions on behalf of its members for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW.

The opinion of the Third Circuit Court of Appeals is not reported; the opinion is attached hereto. (A3-9). The decision of the Court of Appeals denying a request for rehearing is attached hereto. (A1-2). The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 453 F. Supp. 577, 98 LRRM 3225 (1978), and is attached hereto. (A10-18).

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on July 3, 1979, and the timely petition for rehearing was denied on August 3, 1979. This petition for certiorari is being filed within ninety days of the latter date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether, under the test formulated by this Court in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), an arbitration award "draws its essence" from the contract when the arbitrator has interpreted the term "lockout" in the parties' collective bargaining agreement so as to disregard the parties' agreement concerning those threshold elements necessary to constitute a "lockout"?

STATEMENT OF THE CASE.

The Philadelphia Food Store Employers' Labor Council ("Employer") is a multi-employer bargaining association whose members, at all times relevant to this action, were Acme Markets, Inc. ("Acme"), the Great Atlantic and Pacific Tea Company ("A&P"), and Food Fair Stores, Inc. ("Food Fair"). At all times relevant to this litigation, the Employer, on behalf of its members, bargained collectively with a multi-union bargaining unit comprised of Locals 1349, 1357, 1358, 1360, 1361, 1371, and 1393 of the Retail Clerks International Association (hereinafter referred to as "Clerks Union"). The Clerks Union represented the retail clerk employees of Acme, A&P, and Food Fair in their retail stores in Southeastern Pennsylvania, Southern New Jersey, and Northern Delaware. At all times relevant to the instant litigation, the Employer and the Clerks Union were party to a collective bargaining agreement ("Agreement") governing the wages, hours, and working conditions of the Retail Clerks employees at the Employer's stores. The Agreement contained a provision banning strikes and lockouts, the relevant portions of which are set forth in the margin.[1]

The Employer also bargained collectively on behalf of its members with a multi-union bargaining unit con-

1. ARTICLE XXIII, No Strikes, No Lockout

1. The parties agree that there shall be no authorized strikes, stoppage of work, slowdowns, lockouts, or any other interferences of whatsoever nature during the life of this Agreement.

2. Nothing herein contained, however, shall compel any employee to walk through a picket line set up by the Local Unions, parties to this Agreement; Meat Cutters Retail Joint Council of Philadelphia and Vicinity; Philadelphia Teamsters Local Nos. 500, 169, 463; and American Bakery and Confectionery Workers Local Nos. 492, 6; provided said strike has received written approval of the International Unions affiliated with the Local Unions indicated above.

sisting of Locals 56, 195, 198 and 199 of the Amalgamated Meatcutters and Butcher Workers of America (hereinafter collectively referred to as "Meatcutters Union"). The Meatcutters Union represented, for purposes of collective bargaining, the meat and delicatessen employees of Acme, A&P, and Food Fair at their retail stores covered by the Agreement between the Employer and the Clerks Union. The Employer and the Meatcutters Union were signatory to a collective bargaining agreement which by its terms expired on midnight March 5, 1977.

At a March 6, 1977, membership meeting, the Meatcutters Union members who were employed by the three food chains voted to strike the Employer. To implement that strike, the Meatcutters Union engaged in "whipsaw" tactics [2] by launching its strike against the Employer by picketing only the Food Fair portion of the unit. By March 7, 1977, all Food Fair operations within the jurisdiction of the Meatcutters Union were being struck and picketed.

Before the commencement of the whipsaw strike against the Employer at its Food Fair segment, the Clerks Union had announced that it would support the Meatcutters' strike by honoring the Meatcutters' picket lines in a "sympathy strike". In fact, a representative of the Clerks Union had made a statement to that effect at the March 6 meeting of the Meatcutters Union at which the strike vote was taken. Consistent with that pledge, the Clerks Union and its members honored all the Meatcutters' picket lines

2. A "whipsaw" strike occurs when a union which bargains with a multi-employer unit directs its economic pressure at one segment of that unit in an attempt to "divide and conquer" its opponents. This Court has held that a multi-employer bargaining group which is faced with a whipsaw strike against one of its members is entitled to lockout members of the striking union who are employed by the remaining members of the multi-employer unit. *See NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.)*, 353 U. S. 87 (1957).

at Food Fair and thereby compelled the closing of all Food Fair operations in the affected geographic area.

On Tuesday, March 8, 1977, Acme and A&P, who had previously warned the Meatcutters Union that a strike against one of the Employer's members would be considered a strike against all, closed the meat departments of their retail stores within the Meatcutters Union's jurisdiction. The Meatcutters responded to these closings by scattered picketing at several Acme and A&P stores. Members of the Clerks Union uniformly honored these picket lines at the Acme and A&P stores. To protect the integrity of the multi-employer unit and to avoid large economic loss from spoilage of perishables which would inevitably occur should the Meatcutters choose to begin constant picketing of Acme and A&P, the Acme and A&P segments of the Employer, on March 9, 1977, closed their retail store operations within the geographical jurisdiction of the Meatcutters Union.

In response to the total shutdown by the Employer, the Clerks Union filed for "expedited" arbitration of their claim that Acme and A&P had violated the Agreement's ban on lockouts by closing their stores as described above. At the arbitration hearing and in its pre-hearing brief to the arbitrator, the Employer argued that the presence of four elements was absolutely necessary for any shutdown to constitute a "lockout" as that term was used in the Agreement and historically and uniformly recognized in the labor relations context. Those four elements were:

(1) The existence of a dispute between the Employer and those employees claiming to be locked out;

(2) The closing of the place of employment by the Employer;

(3) *Offensive* rather than defensive action on the part of the Employer; and

(4) Termination of the work for the purpose of exacting concessions from those employees claiming a lockout.

A30. The Clerks Union, both orally and in its pre-hearing brief submitted on behalf of Locals 1349, 1358, 1360, 1361, 1371, and 1393, which brief was specifically adopted by counsel for Local 1357 at the hearing, (A63-64, 71), argued that the following three elements must be present for a "lockout" to have occurred:

(1) The existence of a dispute;

(2) *Offensive* employer action; and

(3) Offensive action for the purpose of using the locked out employees as leverage to gain concessions from the striking employees.

A48 *et seq.* The parties thus agreed that a "lockout" occurred only where *offensive* conduct on the part of the employer existed. They disagreed only as to whether the employees "locked out" must be those from whom the Employer is seeking to gain concessions.

In his March 16, 1977, award (A19-25), Arbitrator Lewis Gill upheld the Clerks Union's grievance. Arbitrator Gill rejected out of hand the offensive/defensive categorization which the parties themselves had espoused in their arguments and in their briefs. He concluded that as a defensive response on the part of the Employer to the attempt of the Meatcutters Union with the Clerks Union in sympathy to fragment the single multi-employer bargaining unit, the shutdown was "strategic". Gill's "strategic action" test had never before been employed by any court, arbitrator, state or federal agency, or commentator, and was not advanced by the parties. With the application of this test, the Employer's shutdown was adjudged, as a matter of course, to constitute a "lockout".

On March 31, 1977, the Employer instituted an action under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185, in the United States District Court for the Eastern District of Pennsylvania to set aside and vacate Arbitrator Gill's Opinion and Award. On June 30, 1978, the District Court granted the Employer's Motion for Summary Judgment and vacated Arbitrator Gill's Opinion and Award. The District Court specifically found that:

> [P]rior to the award both parties were in complete agreement that offensive conduct was required by the employer, and that the employer must be seeking leverage over or concessions from *some* employees, whether they be the employees in dispute with management or the employees claiming the lockout.

A15, 453 F. Supp. at 580. Recognizing the limited nature of its review, the Court nonetheless held that since Arbitrator Gill had devised his own definition of the word "lockout", in disregard of the intent of the parties and the commonly accepted meaning of the word, the award did not "draw its essence" from the contract.

On July 3, 1979, the United States Court of Appeals for the Third Circuit reversed the District Court's opinion. Without even discussing the District Court's findings as to the intention of the parties with regard to offensive conduct, the Court of Appeals reasoned that under the standards set forth in *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F. 2d 1123 (3rd Cir. 1969), Arbitrator Gill's award contained a rational definition of the term "lockout" and should not have been set aside. On August 3, 1979, the Court of Appeals denied the Employer's request for a rehearing.

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Raises Significant and Recurring Issues in the System of Industrial Self-Government Fostered by This Court.

Receiving its impetus from Section 203(d) of the Labor-Management Relations Act, 29 U. S. C. § 173(d), arbitration has become in recent years the major vehicle for the resolution of disputes arising during the term of a collective bargaining agreement. It was estimated as early as 1966 that approximately 94% of all collective bargaining agreements in the nation's important industries provide for arbitration as the terminal point of the grievance machinery.[3] Arbitration has appropriately been called "a kingpin of federal labor policy." *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195, 226 (1962) (Brennan, J., dissenting).

In the years since its ground-breaking decision in *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957), this Court has contributed to the growth of arbitration and has carefully nurtured it as a substitute for industrial strife.[4]

3. Major Collective Bargaining Agreements: Arbitration Procedures 5 (U. S. Dept. of Labor Bull. No. 1425-6, 1966).

4. *See, e.g., Steelworkers v. American Manufacturing Co.*, 363 U. S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) (presumption that all disputes arising under a collective bargaining agreement containing a broad arbitration clause are arbitrable); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U. S. 95 (1962) (no-strike clause will be implied into collective bargaining agreement which contains a mandatory grievance/arbitration provision); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U. S. 235 (1970) (federal court may enforce no-strike clause through injunctive relief where the underlying dispute can be submitted to arbitration); *Nolde Brothers, Inc. v. Bakery & Confectionery Workers, Local 358*, 430 U. S. 243 (1977) (dispute over provisions of a collective bargaining agreement which arises after agreement has been terminated subject to arbitration provisions).

The decisions of this Court have created a system of industrial self-government in which the parties to a collective bargaining relationship have been encouraged to resort to private mechanisms for the resolution of day-to-day problems rather than to litigate these issues in court or punish each other on the economic battlefield of strike/lockout.

While this Court has given much attention to the nature and enforcement of the promise to arbitrate, it has rendered only one opinion on the role of a court in reviewing an arbitration award. In *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960), this Court admonished that a reviewing court should not substitute its judgment for that of the arbitrator and should normally defer to the arbitrator's ruling on the merits. This deferral was merited because of the arbitrator's presumed expertise in the customs and practices of a particular industry and his knowledge of the "law of the shop". In this regard, however, the Court noted that:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; *he does not sit to dispense his own brand of industrial justice.* He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, *courts have no choice but to refuse enforcement of the award.*

363 U. S. at 597 (emphasis added).

The *Steelworkers Trilogy*,[5] of which *Enterprise Wheel* forms the final third, was decided against the background of numerous judicial decisions which tended to equate labor arbitration with its commercial counterpart. This Court quite properly instructed that whereas commercial arbitration was a substitute for litigation, labor arbitration was a substitute for industrial strife; and that the assurance that an arbitrator's award would be final and binding was more important in the labor context than in the commercial arena. It was necessary at the time that courts be warned not to substitute their judgment for that of the arbitrator. It is evident from the language quoted above, however, that this Court did not intend that when called upon to review arbitration awards, courts should abdicate even elemental scrutiny of the merits.

5. *Steelworkers v. American Manufacturing Co.*, 363 U. S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

Such judicial abdication is precisely what the Third Circuit has done through the application of a standard first formulated in *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F. 2d 1123 (3rd Cir. 1969), and carried to its most extreme limits in the instant case. In *Ludwig Honold*, the Third Circuit ignored this Court's cautionary language in *Enterprise Wheel* quoted above and adopted an expansive doctrine of deferral to an arbitrator's award which it expressed in the following manner:

> [A] labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can *in any rational way* be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop may a reviewing court disturb the award.

405 F. 2d at 1128. (Emphasis added).

Through its application of this language, the Third Circuit has virtually "gone out of the business" of examin-

ing the merits of arbitration awards. It has refused to exercise even the minimal amount of supervision which this Court called for in *Enterprise Wheel*. An indication, if not a conclusive demonstration, of this abdication of judicial responsibility, is reflected in the fact that in the decade since *Ludwig Honold*, the Third Circuit has permitted the overturning of only *one* arbitration award on the grounds that the award did not draw its essence from the contract.[6] In the case at hand, the Court of Appeals simply looked at the Agreement, found that "lockout" was undefined, and rubber-stamped the Arbitrator's definition on the basis that it was "rational". It did not even bother to address the question of the *parties'* understanding of that term, as the District Court had done at great length. Without significant discussion, the Court of Appeals reversed the decision of the trier of fact and accepted the arbitrator's conception that the Employer's *response* ("defensive" by definition) to what this Court has termed a "sympathy strike"[7] by the Clerks Union constituted a "lockout". The Court of Appeals thus accepted this concept that "strategic" action equals "lockout", a concept which no arbitral, judicial, or administrative tribunal had ever before advanced or articulated, and which both parties had specifically disclaimed, *simply because it emanated from an arbitrator.*

This attitude of "washing our hands of arbitration awards" has profound consequences for the system of industrial self-government fostered by this Court in the years since its *Lincoln Mills* decision. This system is premised upon the parties' accession to arbitration as a fair and effective process of problem-solving and dispute-

6. *Food Workers v. The Great Atlantic and Pacific Tea Co.*, 415 F. 2d 185 (3rd Cir. 1969).

7. *See generally, Buffalo Forge Co. v. Steelworkers,* 428 U. S. 397 (1976).

settlement and on their concomitant pledge to refrain from economic pressure in exchange for arbitration as continuous collective bargaining. While it is important not to strip the arbitrator of his authority to render a final and binding award, it is even more important that some meaningful judicial review of an arbitrator's decision be available to the parties. When such review is foreclosed, as the Third Circuit has done in this totally illegitimate offspring of *Ludwig Honold,* the parties are discouraged from agreeing to submit potentially sensitive disputes to an arbitrator.

The policy adopted by the Third Circuit in this case fosters precisely these tendencies—tendencies which raise doubts in the minds of the parties about the advisability of agreeing to broad arbitration provisions. Such a position, which was certainly not contemplated by this Court's decision in *Enterprise Wheel,* raises significant problems in practical labor relations and creates a compelling need for this Court's review.

II. The Third Circuit's Refusal to Look to the Intention of the Parties Is at Odds With the Role of Arbitration in the Collective Bargaining Process.

By its very nature, a collective bargaining agreement cannot possibly hope to cover every problem or contingency which may arise in the day-to-day relationship between employer, union, and employees. It can at best be a skeletal structure which stakes out certain agreements which can be set down definitively (e.g. wages) and certain broad principles or areas which cannot be set forth so readily (e.g., "just cause" for discharge). The parties' duty to bargain, therefore, does not cease with the execution of the agreement; rather, as the decisions of this Court have confirmed, it continues throughout the existence of

the agreement. *See NLRB v. C&C Plywood Corp.*, 385 U. S. 421 (1967); *NLRB v. Acme Industrial Co.*, 385 U. S. 432 (1967).

It is within this context of the continuing duty to bargain that the role of arbitration must be understood. By agreeing to submit all disputes to arbitration, the parties agree to engage in what this Court has termed "the continuous collective bargaining process". *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960). During this flexible process of bargaining, the arbitrator hears the "offers" of the employer and the union, and often is able to effectuate a settlement between the parties. Only if the parties are unable to settle the dispute themselves does the arbitrator render an award which adopts the position of one of the parties or mediates between the two positions. His role is not to reach outside the context of the positions (or "offers") submitted by the parties and, in this Court's phrase, "dispense his own brand of industrial justice." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960). In fact, the Agreement in the instant case specifically precluded such arbitral forays.[8]

The circumscribed nature of the arbitrator's function is illustrated by the widely accepted notion that an arbitrator is limited to deciding the issue submitted to him by the parties. In this regard, it is well settled that when an arbitrator reaches beyond the bounds of the parties' submission, a reviewing court should refuse to enforce the award. *Retail Store Employees Union Local 782 v. Sav-On Groceries*, 508 F. 2d 500, 502-03 (10th Cir. 1975);

8. Article XI Section 3 of the Agreement provides in relevant part that:

> The Arbitrator shall not have the authority to amend, modify, or in any manner change this Agreement to establish any terms and conditions under this Agreement.

Textile Workers Union of America v. American Thread Co., 291 F. 2d 894, 897 (4th Cir. 1961). The importance of the parties' submission derives from the fact that the parties have bargained for a precise answer from an arbitrator, not from what the Second Circuit has termed a "philosopher-king". *Torrington Co. v. Metal Products Workers Union Local 1645*, 362 F. 2d 677, 682 (2d Cir. 1966).

The Third Circuit's refusal to affirm the District Court's finding that Arbitrator Gill ignored the parties' own understanding of the elements required of a "lockout" is equivalent to condoning an arbitrator's going beyond the terms of the submission agreement. It misapprehends the relationship between collective bargaining and arbitration. This Court should issue a writ of certiorari to correct this misapprehension and to clarify that relationship.

III. The Policy of the Third Circuit Exemplified in the Decision Below Conflicts With the Policy of the Fourth and Sixth Circuits.

This Court has addressed the issue of the scope of a court's review of an arbitration award only in the seminal *Enterprise Wheel* case. As the initial inquiry into this problem, the instruction which this Court offered was properly phrased in terms of broad principles: the arbitrator's award should be affirmed if it draws its essence from the contract. In the nineteen years since *Enterprise Wheel*, however, this Court has provided no further guidance in determining when an arbitrator's award has "drawn its essence" from the contract.

Such guidance is needed because of the divergent philosophies which animate the different circuits in their approach to reviewing the merits of arbitration awards.

As this petition has already noted, the Third Circuit has adopted a particularly restrictive role for a reviewing court. This blind deference to arbitration is at odds with a growing willingness on the part of the Fourth and Sixth Circuits to scrutinize the merits of an award.

The trend is most apparent in several recent decisions of the Sixth Circuit. In *Storer Broadcasting Co. v. AFTRA*, 600 F. 2d 45 (6th Cir. 1979), the Sixth Circuit reversed the decision of the district court and refused to enforce the award of an arbitrator who ruled that employees were entitled to receive "credited" rather than "vested" amounts in a profit-sharing plan when their participation in that plan terminated. The Circuit Court rejected the arbitrator's pivotal inference that the union must have notified its members that they would receive full credited amounts because it found no evidence in the record to support that inference. Likewise, in *Detroit Coal Co. v. Machinists Lodge 82*, 594 F. 2d 575 (6th Cir. 1979), that circuit again reversed a district court and vacated the award of an arbitrator because his interpretation of the word "notify" in the collective bargaining agreement had expanded its meaning beyond that envisioned by the parties. Finally, in *Drivers' Local 89 v. Hays & Nicoulin, Inc.*, 594 F. 2d 1093 (6th Cir. 1979), the Sixth Circuit upheld a district court judgment that an arbitrator had exceeded his authority in ordering the reinstatement of an employee in the face of a contract provision leaving the decision to the employer.

The Fourth Circuit has also approached the issue of judicial review of arbitration awards from a more liberal perspective. In *Baltimore Regional Joint Board v. Webster Clothers Inc.*, 596 F. 2d 95 (4th Cir. 1979), it held that an arbitrator exceeded his authority in ordering the company to pay an amount to the union for distribution to em-

ployees laid off following a shutdown of the company plant, since there was no showing that actual damages had resulted from the company's breach of contract. The Court reasoned that the contract's essence did not contemplate punitive, but only compensatory damages. In *Westinghouse Electric Corp. v. IBEW, Local 1805*, 561 F. 2d 521 (4th Cir. 1977), the Court had previously held unenforceable an arbitration award of extra paid vacation days to employees because the employer had violated the collective bargaining agreement in improperly negotiating over a proposed plant shutdown, since the employees did not suffer any monetary loss or hardship because of the employer's infraction. The Court found simply that no provision of the contract justified the award, which the Court found to be inconsistent with the award of other arbitrators. In *Monongahela Power Co. v. IBEW*, 566 F. 2d 1196 (4th Cir. 1976), the Fourth Circuit refused enforcement of an award which changed the penalties imposed by an employer on employees who had engaged in a strike in violation of a no-strike clause, since the penalties were reserved by the contract to the unqualified discretion of the employer.

It is, of course, true that these cases, like all arbitration cases, turn on their particular facts. They illustrate, however, that at least the Fourth and Sixth Circuits demand that a reviewing court do more than merely look to see if a crucial term is defined in the body of the contract or if the contract contains a specific prohibition on the arbitrator's action. These circuits require that a court determine that an arbitrator has not strayed beyond the understanding (the agreement) of the parties. The approach of the Sixth Circuit in *Detroit Coal, supra,* is significantly different from that of the Third Circuit in the instant case because of its refusal to rubber-stamp the arbitrator's definition of the word "notify".

The different philosophies exhibited by the Third Circuit in *Ludwig Honold* and in its application to the instant case and by the Fourth and Sixth Circuits in the cases discussed above do not, of course, constitute a classic conflict among the circuits in the sense that they have construed the same federal law in different ways. However, their divergent philosophies represent in a way a more enduring conflict, since the law surrounding the review of arbitration awards has been created virtually *ex nihilo* by the Courts of Appeals with only this Court's *Enterprise Wheel* decision for guidance. The petitioner in this case is only one of thousands of employers and unions which, because of the climate of industrial self-government created by this Court, submit sensitive issues of labor relations to "venerable", as well as virtually unknown arbitrators. This Court should chart a uniform standard for reviewing arbitration awards through the different applications of the circuit courts.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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Appendix.

ORDER OF THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2175

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL on behalf of itself and its members: ACME MARKETS, INC.; FOOD FAIR STORES, INC.; and THE GREAT ATLANTIC AND PACIFIC TEA COMPANY,

Appellees

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCALS 1349, Building 2093R, Philadelphia Pike, Claymont, Delaware, 19703, et al.,

Appellants

SUR PETITION FOR REHEARING

Present: WEIS and GARTH, *Circuit Judges* and MEANOR, *District Judge*

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of the court and no judge who concurred in the decision having asked for rehearing, it is

ORDERED that the petition for panel rehearing is denied.

By THE COURT,

JOSEPH F. WEIS, JR.
Circuit Judge

DATED: August 3, 1979

OPINION AND JUDGMENT OF THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2175

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL on behalf of itself and its members: ACME MARKETS, INC.; FOOD FAIR STORES, INC.; and THE GREAT ATLANTIC AND PACIFIC TEA COMPANY,

Appellees

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCALS 1349, Building 2093R, Philadelphia Pike, Claymont, Delaware, 19703; 1357, 210 E. Courtland Street, Philadelphia, Pennsylvania, 19120; 1358, 470 N. Albany Avenue, Atlantic City, N. J., 08401; 1360, 315 Cooper Street, Camden, N. J., 08102; 1361, 1924 Union Boulevard, Allentown, Pennsylvania, 18103; 1371, 334 Farnsworth Avenue, Bordentown, N. J., 08505; and 1393, 200-202 W. Douglas Street, Reading, Pennsylvania, 19601,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 77-1146)

Argued June 5, 1979

Before WEIS and GARTH, *Circuit Judges*, and MEANOR, *District Judge* for the District of New Jersey.*

Opinion filed July 3, 1979

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* Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, 311 United States Courthouse, Newark, New Jersey, 07101, sitting by designation.

OPINION OF THE COURT

PER CURIAM.

Food Fair Stores, Inc., Acme Markets, Inc., and the Atlantic & Pacific Tea Company are members of the appellee Philadelphia Food Store Employers' Labor Council which had a collective bargaining agreement with the Meat Cutters Retail Joint Council of Philadelphia expiring on March 6, 1977. When the parties were unable to agree upon satisfactory terms for a new contract, the Meat Cutters struck all three food store chains, but maintained a regular picket line only at the Food Fair stores. Members of the Retail Clerks International Association, Locals 1349, 1357, 1358, 1360, 1361, 1371, and 1393 that had an existing contract with the Employers' Council refused to cross the picket lines at Food Fair, but did report for work at the Acme and A&P stores.

A&P and Acme closed their stores on March 9, 1977 and the Retail Clerks called for arbitration of their grievance that those two chains had engaged in an illegal lockout. The Clerks relied upon Article XXIII of their contract with the Employers' Council, reading in part:

> "1. The parties agree that there shall be no authorized strikes, stoppages of work, slowdowns, lockouts, or any other interferences of whatsoever nature during the life of this Agreement.
>
> 2. Nothing herein contained, however, shall compel any employee to walk through a picket line set up by the Local Unions, parties to this Agreement, [and] Meat Cutters Retail Joint Council of Philadelphia and Vicinity; . . . provided said strike has received written approval of the International Unions affiliated with the Local Unions indicated above."

The term "lockout" was not defined in the Retail Clerks' agreement, and there being no factual dispute, the interpretation of that term was submitted to the arbitrator. He reasoned that if A&P and Acme closed their stores for "economic" reasons—that is, because it would have been unprofitable to operate them during the Meat Cutters' strike—then there would have been no breach of the Clerks' collective bargaining agreement. But if the closings were "strategic"—designed to gain some advantage or avoid some disadvantage in the continuing negotiation with the Meat Cutters—then the shutdown fell within the meaning of the contractual prohibition. He reached this conclusion even though the employers' dispute was not with the Clerks but with the Meat Cutters. The arbitrator believed that because the closings were intended to prevent "whipsawing" by the unions to exert pressure on the Employers' Council in its negotiations, they were undertaken for strategic purposes and were therefore lockouts. Acme and A&P were directed to reopen their stores and reimburse their clerks for wages lost during the lockout.

The Employers' Council then petitioned the district court to set aside the arbitrator's award. The district judge recognized that an arbitration award could be voided only in unusual circumstances, but concluded that the arbitrator had misinterpreted the word "lockout" and, by ignoring the intent of the parties, had reached a decision which did not draw its essence from the agreement. The district court commented, as had the arbitrator, that the contractual provisions extending to the Clerks' permission to observe picket lines while at the same time prohibiting lockouts placed the employers in an unfavorable bargaining position. Finding no intent to gain a bargaining concession from the Clerks or other offensive conduct, the district court concluded there could be no lockout and entered summary judgment for the Employers' Council.

In *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F. 2d 1123, 1128 (3d Cir. 1969), we formulated a standard of review which is to be observed in passing upon arbitration awards in labor disputes. In general, if the contractual interpretation can be derived in any rational way from the agreement, viewed in the light of its language, context, and any other indicia of the parties' intention, the award must be upheld. It may be set aside only where there is a manifest disregard of the agreement unsupported by principles of contract construction and the law of the shop.

We do not find the arbitrator's decision to lack a rational basis, nor do we believe that his use of the terms "strategic" and "economic" were contrary to the general understanding of "lockout." The interpretation of the term was clearly within the scope of the issue submitted to the arbitrator, and his determinations should not have been disturbed. Any unfairness to the employers which may have resulted because the employees were free to honor the picket lines of the other union was created by contractual provisions to which the Employers' Council had agreed. The inequality of bargaining position is not a sufficient reason to set aside the arbitrator's award.

Accordingly, the judgment of the district court will be vacated and the case will be remanded for the entry of judgment in favor of the appellant.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2175

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL on behalf of itself and its members ACME MARKETS, INC., FOOD FAIR STORES, INC., and THE GREAT ATLANTIC AND PACIFIC TEA COMPANY

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCALS 1349, Building 2093R, Philadelphia Pike, Claymont, Delaware, 19703; 1357, 210 E. Courtland Street, Philadelphia, Pa., 19120; 1358, 470 N. Albany Avenue, Atlantic City, N. J., 08401; 1360, 315 Cooper Street, Camden, N. J., 08102; 1361, 1924 Union Boulevard, Allentown, Pa., 18103; 1371, 334 Farnsworth Avenue, Bordentown, N. J., 08505; 1393, 200-202 W. Douglas Street, Reading, Pa., 19601,

Appellants

(D. C. Civil Action No. 77-1146)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: WEIS and GARTH, *Circuit Judges* and MEANOR, *District Judge.*°

° Honorable H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 5, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 3, 1978, be, and the same is hereby vacated and the cause remanded for the entry of judgment in favor of appellants. Costs taxed against appellees.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

July 3, 1979

MEMORANDUM AND ORDER OF THE U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1146

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL on behalf of itself and its members; ACME MARKETS, INC.; FOOD FAIR STORES, INC.; and THE GREAT ATLANTIC AND PACIFIC TEA COMPANY

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATIONS LOCALS 1349, 1357, 1358, 1360, 1361, 1371 and 1393

MEMORANDUM AND ORDER

June 30, 1978

TROUTMAN, J.

Before this Court is an appeal from an arbitration award in favor of defendants Retail Clerks International Associations and the Local Unions (the Retail Clerks) by plaintiff Philadelphia Food Stores Employers' Labor Council (the Council) and its members, Acme Markets, Inc. (Acme), Food Fair Stores, Inc., (Food Fair) and The Great Atlantic and Pacific Tea Company (A&P), in which

the Council contends that Arbitrator Lewis Gill's award should be vacated. The Council seeks summary judgment so vacating the award; the Retail Clerks seek summary judgment enforcing the award.

Material facts are not in dispute. Both parties are parties to a collective bargaining agreement. The agreement requires that all grievances or disputes arising during the term of the agreement concerning the interpretation or application of the provisions of the agreement would be submitted to arbitration; the arbitrator would have no power to amend, modify, or change the agreement, or establish any terms or conditions under the agreement; the decision of the arbitrator would be final and binding on the parties and employees involved; and in the event of an alleged or asserted breach of contract there was a procedure for expedited arbitration.

The agreement also contains the following language regarding strikes and lockouts:

> "ARTICLE XXIII
>
> No Strikes, No Lockouts
>
> 1. The parties agree that there shall be no authorized strikes, stoppages of work slowdowns, lockouts, or any other interferences of whatsoever nature during the life of this Agreement.
>
> 2. Nothing herein contained, however, shall compel any employee to walk through a picket line set up by the Local Unions, parties to this Agreement; Meat Cutters Retail Joint Council of Philadelphia and Vicinity; Philadelphia Teamsters Local Nos. 500, 169, 463; and American Bakery and Confectionery Workers Local Nos. 492, 6; provided said strike has received written approval of the International Unions affiliated with the Local Unions indicated above.

3. In the event of a threat of, preparation for, or the actuality of an unauthorized work stoppage, walkout or strike, the Union and all of its officials will take every reasonable action to prevent and to stop such proceedings by any of its members.

The Council also has a contract with the Meat Cutters Retail Joint Council of Philadelphia and Vicinity (the Meat Cutters). On or about March 6, 1977, the Meat Cutters, who were negotiating a new contract with the Council, called a strike against Food Fair. On or about March 9, 1977 the three companies closed down their stores, despite the fact that this resulted in closing out the Retail Clerks who had a contract still in effect and despite the no-lockout provision of that ongoing contract.

The issue then arose as to whether A&P and Acme, who were not being struck, violated the no-lockout provisions of their contract with the Retail Clerks, and this matter was submitted to Arbitrator Gill. On March 16, 1977, Gill issued an Award holding that A&P and Acme had violated the no-lockout provision of their contract with the Retail Clerks. This appeal followed; the Council now contends that the Award does not draw its essence from the collective bargaining agreement; it was rendered in manifest disregard of the law; it is arbitrary and capricious; it is based upon a gross mistake of fact; it contravenes public policy; it is beyond the submission to the arbitrator; it is ambiguous; and the arbitrator exceeded his authority under the agreement in rendering the award.

It is well settled that reviewing courts can only set aside arbitration awards under extreme circumstances; judicial review of an arbitrator's award is severely limited and the arbitrator's interpretation of contractual provisions will not be disturbed if the interpretation can in any way

be derived from the agreement. *Local 103 of I. U. E., R. & M. Workers v. RCA Corp.*, 516 F. 2d 1336 (3d Cir. 1975). There is strong public policy in encouraging the peaceful settlement of industrial disputes by means of the device of arbitration. Thus, it has been stated that the "interpretation of labor arbitrators must not be disturbed so long as they are not in 'manifest disregard' of the law and that the issue of whether an arbitrator misconstrued a contract does not open the award to judicial review." *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123, 1128. Accordingly, a labor arbitrator's award draws its essence from the collective bargaining agreement if the interpretation can in any way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award. See *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3d Cir. 1969).

Thus, the circumstances in which an arbitrator's award may be disturbed are extreme: the award may be disturbed if it is too vague and ambiguous for enforcement, *Ferrick v. B. & O. Railroad Co.*, 447 F. 2d 89 (3d Cir. 1971); *Ludwig Honold Mfg. Co. v. Fletcher, supra;* or if the award is dishonest, capricious or beyond the authority of the collective bargaining agreement, *Price v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 457 F. 2d 605 (3d Cir. 1972); or if it is completely irrational, *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F. 2d 1125 (3d Cir. 1972); or if it is not (*sic*) patently frivolous, *Amalgamated Meat Cutters v. Cross Brothers Meat Packers*, 518 F. 2d 1113 (3d Cir. 1975); or if an examination of the record before the arbitrator reveals no support for the award, *NF&M Corp. v.*

United Steelworkers of America, 524 F. 2d 756 (3d Cir. 1975).

The Council argues that Arbitrator Gill's award is within these extreme circumstances, and should therefore be vacated. Specifically, the Council contends that the Arbitrator capriciously disregarded the accepted definition of the term "lockout". A "lockout" is defined as "an employer's withholding of work from his employees in order to gain a concession *from them.*" (Emphasis added) Restatement of Torts, Section 787, comment a, cited in Local 50, *Bakery & Confectionary Workers, International Union of America, AFL v. General Baking Co., et al.,* 97 F. Supp. 73 (S. D. N. Y. 1951). See also *Brandenburg v. Capitol Distributors Corp., et al.,* 353 F. Supp. 115 (S. D. N. Y. 1972); *News Union of Baltimore v. Hearst Corporation,* 278 F. Supp. 423 (D. Md. 1968); *Associated Transport, Inc.,* 50 Lab. Arb. 236 (1968); *Akers Motor Lines, Inc.,* 51 Lab. Arb. 1955 (1968); *Mich. Lathing & Plastering Contractors Association,* 52 Lab. Arb. 997 (1969); *Bell Aerosystems Co.,* 54 Lab. Arb. 745 (1970).

The Council argues that for a lockout to exist, there must be four elements; (1) a dispute between the employer and those employees claiming to be locked out; (2) the closing of the place of employment by the employer; (3) the action of the employer must be offensive, not defensive; (4) the termination must be implemented as an economic weapon for the purpose of exacting concessions from those employees claiming a lockout. Furthermore, in their briefs before the arbitrator, the Unions contended that for a lockout to exist, there must be these elements: (1) the existence of a dispute; (2) offensive employer action; (3) the purpose of which is to use the locked out employees as leverage to gain concessions from the striking employees. The parties thus sharply dispute whether the dispute existing must be between the employer and the

employees alleging the existence of a lockout, or whether it is sufficient that a dispute exist between the employer and *any employees,* and that the employer locks out the employees alleging such action in order to gain advantage over the employees with whom the dispute exists. It is highly significant that prior to the award both parties were in complete agreement that offensive conduct was required by the employer, and that the employer must be seeking leverage over or concessions from *some* employees, whether they be the employees in dispute with management or the employees claiming the lockout.

Despite this degree of understanding between the parties and despite the holdings of cases and arbitration decisions holding that a lockout requires that an employer withhold work in order to gain concessions from employees, Arbitrator Gill devised his own definition of this most crucial term. He held that a lockout exists if the employer is engaged in "strategic" conduct. In so doing, he held that an employer could violate the law if his conduct was not offensive, or designed to gain leverage over or exact concessions from employees.

We find that in so holding Arbitrator Gill disregarded the intent of the parties. Clearly when the contract was drafted, and later when arbitration was sought, the parties deemed offensive employer action an element of a lockout. However, Arbitrator Gill nullified this requirement, without being asked to do so by the Unions in their briefs submitted to him. By ignoring the intent of the parties, he reached a decision that does not draw its essence from the collective bargaining agreement, because his interpretation cannot be derived from the agreement, in light of the language—the term lockout—and other indicia of the parties' intention, as are manifested, *inter alia,* by the Unions' brief submitted to Arbitrator Gill. Furthermore, the award was

in "manifest disregard" of the law, as well as of the agreement. Thus, this Court may disturb the award, pursuant to the dictates of *Ludwig Honold* and the other cases cited above.

Furthermore, the Court must so act to restore proper contractual equilibrium to the parties. It is ironic that Arbitrator Gill, in spite of the contractual prohibition against his amending, modifying, or changing the agreement, or establishing any terms or conditions under the agreement, did modify a crucial term and then observed:

> "Finally, I must frankly acknowledge that the result here, viewed apart from the legalities of the matter, may seem to leave the bargaining postures of the parties somewhat lopsided and arguably unfair to management. The Clerks can and did shut down Food Fair entirely by honoring the Meatcutters' picket lines, while the management can only retaliate by shutting down the *meat departments* at Acme and A&P, thus putting management in the position of trying to fight with one hand tied behind its back. ° ° °" *Retail Clerks International Association and Acme Markets, Inc. and The Great Atlantic and Pacific Tea Company, Inc.*, (AAA Case No. 14 30 0308 77 MC) Slip Opinion at p. 6.

Thus, in vacating this holding by Arbitrator Gill, this Court is not only upholding the principle established by the Supreme Court in *United Steelworkers of America [v.] Enterprise Wheel and Car Corporation*, 363 U. S. 593 (1960), that an arbitrator does not sit to dispense his own brand of industrial justice, and that when an arbitrator's words manifest an infidelity to his obligation to draw the essence of his award from the collective bargaining agreement the courts have no choice but to refuse enforcement

of the award; this Court is also unbinding the hand of the Council which was bound behind its back not by the terms of the contract but by Arbitrator Gill's brand of industrial justice; in so doing we are restoring the arm's length posture the parties occupied prior to this award.

In finding that offensive conduct or an effort to gain advantage over employees is a necessity in order to find the existence of a lockout, we then note that in his opinion Arbitrator Gill found that the decision of Acme and A&P to shut down was motivated by their desire to preserve the integrity of the multi-employer bargaining, to prevent the three member chains from being whipsawed by having one shut down while the others continued to be open, thus bringing obvious pressure on the struck chain to reach a settlement; he found that the "purpose was to prevent whipsawing in the Meatcutters' negotiations, rather than to gain some immediate or future concession from the Clerks ° ° ° " *Retail Clerks International and Acme Markets, Inc. and The Great Atlantic and Pacific Tea Company, Inc., supra*, at p. 5. Thus, by his own terms, there was no offensive conduct or intent to gain concessions from the employees. Therefore, the termination of business at the Acme and A&P Stores cannot be considered a lockout in violation of the contract.

Accordingly, the plaintiff's motion for summary judgment will be granted and the defendant's motion for summary judgment will be denied.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 77-1146

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL on behalf of itself and its members; ACME MARKETS, INC.; FOOD FAIR STORES, INC.; and THE GREAT ATLANTIC AND PACIFIC TEA COMPANY

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATIONS LOCALS 1349, 1357, 1358, 1360, 1361, 1371, and 1393

ORDER

TROUTMAN, J.

AND NOW, this 30th day of June, 1978, IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED and defendant's motion for summary judgment is DENIED.

E. MAC TROUTMAN, *J.*

OPINION AND AWARD OF ARBITRATOR LEWIS GILL.

RETAIL CLERKS INTERNATIONAL ASSOCIATION

and

ACME MARKETS, INC. and THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.

Arbitration
(AAA Case No. 14 30 0308 77M)

OPINION

This case has been processed through an expedited arbitration procedure set forth in the contract between the Philadelphia Food Store Employers' Labor Council (and its members Acme, A&P, and Food Fair) and various locals of the Retail Clerks International Association, herein called the Clerks.

A hearing was held at the American Arbitration Association offices in Philadelphia on March 15, 1977, and by agreement of all parties, this decision is being issued the next day. Of necessity, this explanatory Opinion will be relatively brief.

The issue to be decided is the claim by the Clerks that Acme and A&P have violated the no-strike, no-lockout provision in the contract by closing down their stores after the third chain covered by the contract, Food Fair, was struck by the Amalgamated Meatcutters Union, herein called the Meatcutters. (The Food Fair stores are currently known as Pantry Pride, but I will use the term Food Fair herein.)

The essentially undisputed facts are these:

The Meatcutters' contract with the three chains expired on Sunday, March 6th at midnight, and at that time the Meatcutters struck Food Fair, closing the meat departments in all the Food Fair stores in the area. Pickets were posted the next morning at all of those stores, and the Clerks' members refused to cross the picket lines, resulting in a complete shutdown of all the Food Fair stores. (There were some stores at which management had shut the store down before the pickets actually arrived, but it is agreed that the Clerks had publicly announced that they would honor the Meatcutters' picket lines; it is clear that the closing of the Food Fair stores was brought on by the Clerks' support of the Meatcutters' strike.)

In response to this action by the Meatcutters and the Clerks, the other two chains, Acme and A&P, first closed down their meat departments and then closed down their stores entirely. Except for a few sporadic instances of unauthorized Meatcutter pickets appearing at a few of the hundreds of Acme and A&P stores (which pickets were promptly withdrawn on directions of the Meatcutters' Union officers), the Meatcutters did not picket the Acme and A&P stores. It is clear that *those* stores were closed by management decision, not by any action on the part of the Meatcutters or the Clerks at those stores.

The issue is whether this management action constituted a lockout in violation of Section 1 of Article XXIII of the Clerks' contract, which was in force at the time and which does not expire until January 1978. That Section reads as follows:

> "The parties agree that there shall be no authorized strikes, stoppages of work, slowdowns, lockouts, or any other interferences of whatsoever nature during the life of this Agreement."

Also relevant is Section 2 of that same Article XXIII, reading as follows:

> "Nothing herein contained, however, shall compel any employee to walk through a picket line set up by the Locals Unions, parties to this Agreement; Meat Cutters Retail Joint Council of Philadelphia and Vicinity; Philadelphia Teamsters Locals #500, 169, 463; and American Bakery and Confectionery Workers Local #492, 6; provided said strike has received written approval of the International Unions affiliated with the Local Unions indicated above."

(It is agreed that the necessary approval of the Meatcutters' strike was obtained, and that the members of the Clerks were not in violation of the contract by refusing to cross the picket lines at the Food Fair stores.)

As of this writing, the strike by the Meatcutters at Food Fair continues, and all of the stores of the three chains are still shut down. The Meatcutters are not a party to this present case, nor is Food Fair. There is no issue here as to whether the Acme and A&P managements acted legally in closing down their *meat departments*, their contracts with the Meatcutters having expired along with its no-strike, no-lockout clause. The issue is whether Acme and A&P violated the above-quoted provision of the *Clerks'* contract, which is still in effect.

The Clerks seek a ruling that those stores did violate Article XXIII in closing the stores, and ask that they be directed to cease the lockout against the members of the Clerks and compensate them for the time they have lost.

Acme and A&P contend that their actions did not constitute a "lockout" as that term has been defined in various court and arbitration decisions, a contention which is sharply disputed by the Clerks. Each side has cited a

number of arbitration decisions claimed to support its position. I have studied them, as well as the briefs and arguments presented at the hearing yesterday, and have reached the following conclusions:

1. In determining whether or not a management decision to shut down constitutes a "lockout", the critical question in my opinion is whether the purpose of the shutdown is primarily a *strategic* reason (to gain some advantage or avoid some disadvantage in negotiations) or whether it is motivated by a business decision that continued operation would not be economically feasible. I have purposely used the term "strategic" reason, because I think that term is more clear and descriptive than terms such as "offensive" or "defensive" purposes, which are used in a number of the cited decisions.

2. While some of the decisions contain language to the effect that the "offensive" (or "strategic") purpose must be to gain some concession or negotiating advantage *as to the employees or Union claiming to be locked out*, other decisions do not so limit the concept, and I am persuaded that it should not be so limited. This is a crucial point in the case, as will appear.

3. From the evidence and arguments, I am convinced that the decision of Acme and A&P to shut down was motivated primarily by what their counsel described as a desire to "preserve the integrity of the multi-employer bargaining".[1] Counsel elaborated on this point by saying that the purpose was to prevent the three chains from being "whip-

1. The Companies made another contention which merits little discussion—to the effect that the decision to close Acme and A & P was also brought on by fear that Meatcutter pickets might appear at any time at their stores. But the Companies themselves heavily stressed the fact that the publicly proclaimed union strategy was to bring pressure on Food Fair by *not* picketing Acme and A & P.

sawed" by having one of the chains shut down while the others continued to be open, thus bringing obvious pressure on the struck chain to reach a settlement. And I think there is no doubt that this purpose is very obviously "strategic" in nature, which brings the shutdown within the category of a "lockout" in my opinion.

4. It is important to make clear the distinction between such a retaliatory shutdown *during* the contract and a similar action at the *end* of the contract. While the latter situation is not an issue before me, it seems to be agreed all around that such shutdowns at the end of a contract are not violative of the law, under the leading United States Supreme Court decision in the 1957 *Buffalo Linen* case. But that decision, upholding an NLRB ruling that the shutdowns did not violate the Taft-Hartley Act, plainly does not answer the question here, whether the same kind of shutdowns *during the contract* violate the no-lockout provision. Granted, the economic effect of the whipsawing is just as great then, and the impact on the "integrity of the multi-employer bargaining" is just as powerful now is as it would be at the end of the Clerks' contract. The desire of management to avoid these consequences is perfectly understandable, but of course the issue here is not whether the purpose is understandable, but whether it is violative of the contract to implement that purpose by shutting down. And that, in turn, depends on whether the shutdowns constituted a "lockout".

5. As stated above, I am convinced that these shutdowns *did* constitute a lockout. The fact that the purpose was to prevent whipsawing in the Meatcutters' negotiations, rather than to gain some immediate or future concession from the Clerks, is in my view not decisive. The purpose was still *strategic*—whether it be described as

"offensive" strategy (to gain an advantage in the Meatcutter negotiations) or "defensive" strategy (to avoid being put at a disadvantage). It was certainly *not*—and is not even claimed to be—a decision that shutting down was necessary because it would be economically unfeasible to try to operate the stores without the meat departments.

6. In this respect, the case is dramatically different from the most closely comparable decision, by Arbitrator Peter Seitz in a 1964 case involving a strike and alleged lockout in the Baltimore area food chains. There the role of these same two unions was reversed. The *Clerks* struck one of the chains upon the expiration of the Clerks' multi-employer contract with all the chains, and the other chains closed down in support of the struck chain. There the *Meatcutters* alleged a lockout in violation of *their* contract, which was still in effect. Arbitrator Seitz, in a decision which is cited by both sides here, and which I have therefore read with particular care, spells out in detail why he concludes that the motivation to close the meat departments along with the rest of the stores was *not* shown to be strategic rather than based on a business judgment that it was not feasible to try to run the meat departments with the rest of the stores (represented by the Clerks) shut down. Here there is no claim, and certainly no evidence, that the converse is true. I may add that most if not all of the other cited cases in which arbitrators denied claims of lockouts, also involved situations in which the arbitrator was evidently persuaded that the shutdowns were motivated by business reasons rather than strategic bargaining considerations.

7. Finally, I must frankly acknowledge that the result here, viewed apart from the legalities of the matter, may seem to leave the bargaining postures of the parties somewhat lopsided and arguably unfair to management. The

Clerks can and did shut down Food Fair entirely by honoring the Meatcutters' picket lines, while the management can only retaliate by shutting down the *meat departments* at Acme and A&P, thus putting management in the position of trying to fight with one hand tied behind its back. But whatever I may think of the equities of such an arrangement, I am *not* free to disregard the legalities. Management is in this unenviable posture because of the contract provision it has agreed to, specifically granting the members of the Clerks the right to refuse to cross the Meatcutter picket lines, thus giving them the power to shut down Food Fair without violating the contract. There is no such escape clause giving Acme and A&P an exception to the no-lockout provision. The only way in which their action can be squared with the contract is to find that the shutdowns *did not constitute a lockout*, and in my judgment the evidence and arguments do not justify such a finding.

AWARD.

The refusal of Acme and A&P to permit the members of the Clerks to work during the current Meatcutter strike at Food Fair is found to be a lockout in violation of the no-lockout provision in the Clerks' contract with Acme and A&P. Acme and A&P are directed to terminate the lockout, and to compensate the members of the Clerks' bargaining unit for their loss of pay resulting from the lockout.

LEWIS M. GILL,
Arbitrator

March 16, 1977

BRIEF OF ACME MARKETS, INC. BEFORE ARBITRATOR LEWIS GILL.

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
Before Arbitrator LEWIS M. GILL

In the Matter of Arbitration Between

THE GREAT ATLANTIC & PACIFIC TEA CO.

and

ACME MARKETS, INC.

and

RETAIL CLERKS INTERNATIONAL ASSOCIATION
LOCALS 1349, 1357, 1358, 1360, 1361, 1371 & 1393

BRIEF ON BEHALF OF ACME MARKETS, INC.

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I. BRIEF OUTLINE OF FACTS LEADING TO THE INSTANT ARBITRATION.

The instant dispute involves Retail Clerks International Association Locals 1349, 1357, 1358, 1360, 1361, 1371 and 1393 ("Retail Clerks") and Acme Markets, Inc. ("Acme"), the Great Atlantic & Pacific Tea Co. ("A&P") and Food Fair. Acme, A&P and Food Fair (referred to collectively as the "Employers") comprise a multi-employer bargaining unit, which unit bargains collectively with the Retail Clerks and with Amalgamated Meatcutters Local Unions 56, 195, 198 and 199 ("Meatcutters"), as participating members of the Philadelphia Food Store Employers' Labor Council ("the Council"). Acme, A&P and Food Fair are signatory to an existing collective bargaining agreement ("the Agreement") with the Retail Clerks. The Employers contract with the Meatcutters expired on March 6, 1977. Prior to expiration, the Employers had consistently informed the Meatcutters that "a strike against one Employer member of the Employer bargaining unit would be viewed as a strike against all Employers". Notwithstanding this statement, the Meatcutters struck Food Fair. Meatcutter pickets appeared at Food Fair stores and warehouses. Food Fair employees represented by the Retail Clerks have continuously refused to cross these picket lines thus requiring Food Fair to shut its stores.

As a result of this strike by the Meatcutters against the multi-employer unit, on Tuesday, March 8, 1977 Acme and A&P closed their meat departments. Shortly thereafter on March 8, Meatcutter pickets appeared at certain of Acme's stores. Upon their appearance at those stores, Acme's retail clerks at those stores would not cross the picket lines to enter those stores. Upon termination of the picketing at these stores by the Meatcutters, the retail clerks went to work.

As a result of the activities of the Meatcutters and the Retail Clerks and the concomitant economic consequences, Acme and A&P as part of the multi-employer unit made an operating decision to close their stores within the territorial jurisdiction of the Meatcutters. It is this multi-employer *unit* which is signatory as "Employer" to the Retail Clerks collective bargaining agreement. When one portion of the multi-employer unit ("Employer") experiences economic pressure by unions, then, consistent with applicable law, such activity is considered activity against the unit as a whole. Consequently, when Acme and A&P reached their decision to close their stores, as a result of the Meatcutter strike and the Retail Clerks' observance of that strike, that decision was made within the framework of a multi-employer unit and within the concept of multi-employer bargaining.

In response to this decision, the Retail Clerks contend that Acme and A&P have locked them out in violation of the no-strike, no-lockout provision of the Agreement. The Retail Clerks have filed a demand for expedited arbitration under Article XI of the Agreement which provides:

> In the alternative, either party in the event of an alleged or asserted breach of Article XXIII may institute expedited arbitration by telegram to American Arbitration Association and the other party, and American Arbitration Association shall designate the Arbitrator within twenty-four (24) hours of receipt of telegram. The Arbitrator shall promptly hold the hearing but in no event later than twenty-four (24) hours after the receipt of notice. The Award of the Arbitrator shall issue forthwith and in no event later than three (3) hours after conclusion of the hearing. The Award of the Arbitrator shall be in writing and may be issued without opinion. If any party desires an opinion, one shall be issued, but its issuance shall not delay compliance with the enforcement of the Award. The Arbitrator may award injunctive relief and other appropriate relief. Failure of any party to attend arbitration hearing as scheduled and noticed by American Arbitration Association shall not delay arbitration and Arbitrator is authorized to proceed to take evidence as if such party was present. Enforcement of such an Award by a Court of Law is not precluded by election of this alternative procedure.

One demand for arbitration was made by telegram on behalf of Retail Clerks Locals 1349, 1358, 1360, 1361, 1371, and 1393 alleging Acme and A&P to be in violation of Article XI of the Agreement. A second, similar demand was made by telegram on behalf of Retail Clerks Local 1357. As a result of these demands, Arbitrator Lewis Gill was selected by the parties to adjudicate the instant dispute.

II. Discussion.

A. *Definition of the Term Lockout.*

The Retail Clerks Unions in their demand for arbitration have contended that Acme, by closing its stores, has violated Article XXIII, "No Strikes, No Lockouts", of the Agreement. Article XXIII provides in pertinent part as follows:

> 1. The parties agree that there shall be no authorized strikes, stoppages of work, slowdowns, lockouts, or any other interferences of whatsoever nature during the life of this Agreement.
>
> 2. Nothing herein contained, however, shall compel any employee to walk through a picket line set up by

> the Local Unions, parties to this Agreement; Meat Cutters Retail Joint Council of Philadelphia and Vicinity; Philadelphia Teamsters Locals #500, 169, 463; and American Bakery and Confectionery Workers Local #492, 6; provided said strike has received written approval of the International Unions affiliated with the Local Unions indicated above.
>
> 3. In the event of a threat of, preparation for, or the actuality of an unauthorized work stoppage, walk out or strike, the Union and all of its officials will take every reasonable action to prevent and to stop such proceedings by any of its members.

Such standard "no strike—no lockout" provisions, have consistently been interpreted by courts and arbitrators to have no application to an employer close down of its operations unless *all* of the following conditions are present:

> (1) There must exist a dispute between the parties to the collective bargaining agreement involved;
>
> (2) The place of employment is closed to the grieving union by the employer;
>
> (3) The employer's action is an "offensive" rather than "defensive" action; and
>
> (4) The purpose of the Employer is to use such deprivation of employment as an economic weapon to gain concessions from the grieving employees.

See, e.g., Acme Markets, Inc., 43 LA 295 (1964 Seitz).

B. *Analysis and Summary of Case Law.*

This well-established test of a lockout has been repeatedly articulated and often applied by numerous arbitrators and many courts. For example, in *Mrs. Conkling's Bakery*, 15 LA 168 (1950 Aaron), a multi-employer group, of which Mrs. Conkling's Bakery was a member, had been informed by the Bakery Workers Union that one of its members would be struck. Rather than waiting to see which company would be the strike target, all of the companies in the multi-employer unit ceased their operations. Operating Engineers Local 526, which represented some of Mrs. Conkling's employees, grieved that the shutdown violated the no lockout provision of its collective bargaining agreement with Mrs. Conkling's Bakery. In reaching his decision, Arbitrator Benjamin Aaron adopted the following definition of "lockout":

> The temporary closing down by the employer of a factory or establishment in order to compel the workers to agree to conditions detailed by the employer or in order to force them to acquiesce (sic) in some of their own demands. The lockout is sometimes used by the employer as a retaliatory measure against striking employees.

15 LA at 171.

In applying that definition, Arbitrator Aaron held that the Mrs. Conkling's Bakery had not "locked out" the grieving employees and, therefore, had not violated the no lockout provision of the collective bargaining agreement.[1] The rationale of the arbitrator was that:

> There was no controversy between the company and the Operating Engineers. (The grievants) simply happened to be indirectly affected by the action taken by the company against the Bakery Workers Union.

1. The clause provided, in pertinent part:
The Employer . . . shall not cause or permit any lockout of the members of the Union . . .
15 LA at 169.

15 LA at 171. Thus, Arbitrator Aaron concluded that Mrs. Conkling's shutdown was not an offensive weapon used to obtain concessions from the grieving union and did not constitute a "lockout" of the employees covered by its collective bargaining agreement with the Operating Engineers.

Apparently, the Operating Engineers also argued that Mrs. Conkling economically could have continued to employ Operating Engineers even absent the Bakery Workers. The Arbitrator dismissed this argument as irrelevant by stating:

> The fact that the Company might profitably have continued (sic) operations during the strike is therefor irrelevant, as is also the fact that the other bakeries (in the multi-employer unit) continued to provide work for members of the Operating Engineers during the strike. Under its contract with the Union, the Company had a right to close down, and the comparative wisdom of its decision to do so cannot be challenged by the Union or judged by the arbitrator.

15 LA at 171-172.

Similarly, in *Acme Markets, Inc.*, 43 LA 295 (1964 Seitz), Arbitrator Peter Seitz was faced with the same kind of problem in applying the definition of lockout to a shutdown of supermarkets in the Baltimore, Maryland area. The *Acme* case is substantially similar to the instant dispute, except that the roles of the perspective unions (Meatcutters and Retail Clerks) were reversed. In that case, Acme, A&P and several other food chains, were part of a multi-employer bargaining unit which was negotiating with the Retail Clerks. Acme, at the expiration of the collective bargaining agreement with the retail clerks, was selected by the Retail Clerks as the target for a walkout

which effectively closed its stores. The other members of the multi-employer group, in response to the whipsaw strike, closed their doors. As a result, the Meatcutters, who had existing collective bargaining agreements with each of the food chains, grieved that the shutdown violated the "no-lockout" clause of those agreements. Arbitrator Seitz concluded that the action of the food chains *was not a lockout*. Applying the definition of lockout stated *supra*, he held that the shutdown was not being used to obtain any concession from the Meatcutters. Specifically, he concluded:

> . . . (T)here is no basis for a finding, such as is apparently requested by the Union (Meatcutters), that a closing of the stores because of a strike by the Clerks or to protect a multi-employer bargaining unit discloses a design, purpose or intent, by offensive action against the Meatcutters, to weaken its Union in advance of negotiations. The theory that the closing of the stores was done because it was the business judgment of employers that the economic objectives of the supermarkets could not be achieved by fragmented operation is at least as consistent with the facts as the theory that behind the closing was some covert design to strike at the clerks and Meatcutters. It should be remarked that the Meatcutters produce no *proof* that the design was offensive action against them. They merely assert that the fact that the stores *could* have been operated, selling meat *only*, and that if this had been done the overall loss to the companies resulting from store closings would have been reduced *demonstrates* an offensive design against the Meatcutters.

43 LA at 298 (emphasis supplied).

Arbitrator Seitz concluded that the Meatcutters' grievance turned upon:

> Whether the reluctance of the companies to decide to operate under such conditions discloses a motive and design to wrest economic concessions from the Meatcutters and amounts to a lockout.

43 LA at 299. He concluded that the Meatcutters had not met their burden of proof in establishing the existence of such a motive and design and, therefore, dismissed the grievance.

It is interesting to note that the Meatcutters attempted to offer proof of such a motive and design by offering evidence that it was more economical for the food chain to operate by selling *only meat* than it was to shut down completely. The arbitrator dismissed this argument as one which would not establish any such motive. In this regard, he concluded:

> However, I am reluctant to substitute my business judgment for that of the companies; and in any event *proof of improvident action due to a faulty business judgment is hardly to be considered proof of a prohibited "lockout".*

43 LA at 298 (emphasis added).

While decisions reflecting the above-cited holdings are legion (*See*, for example, *Associated Transport, Inc.*, 50 LA 236 (1968 Dunau); *Brown & Williamson Tobacco Corp.*, 58 LA 733 (1972 Belkin); *Bell Aerosystems*, 54 LA 745 (1970 Seitz); *Pan American World Airways, Inc.*, 36 LA 1232 (1961 Wolff), it is helpful to examine one additional such case, illustrative of these principles. That is, *Great Atlantic & Pacific Tea Co.*, 32 LA 838 (1959 Turkus).

In that case, A&P, which had a collective bargaining agreement with the Meatcutters, was negotiating a replacement contract with the Teamsters. These negotiations resulted in a Teamsters' strike. Prior to this strike, the Meatcutters had assured A&P that they would continue to work during any such strike and would consider any closing of the stores a violation of the no strike-no lockout provision of their agreement. Notwithstanding the Meatcutters' position, A&P closed its stores for the duration of the strike. The Meatcutters grieved this action as a claimed violation of its no-strike, no-lockout clause with A&P.

Arbitrator Burton Turkus concluded that the conduct of A&P in shutting down its stores did not constitute a lockout. He observed as follows:

> Did the Company's action in closing its stores and markets constitute a "lockout" within the scope of the no lockout pledge in Article XV of the contracts under consideration? There is nothing novel or complex in discerning and determining a lockout situation. "A 'lockout' has been defined at common law as the cessation (by the employer) of the furnishing of work to employees in an effort to get for the employer more desirable terms." (Betts Cadillac Olds, Inc., 96 NLRB 268, 28 LRRM 1509). The ordinary, "garden variety", Webster Dictionary found somewhere in practically every household defines lockout—
>
> "To withhold employment (from a body of employees) as a means of bringing them to accept the employers' terms."
>
> What is a lockout, is no mystery—the average worker, the man in the street, the novice, as well as the seasoned veteran in the field of industrial relations, all know and recognize a lockout. There must

be a dispute between the employer and employees; the employer shuts down because of it and takes the initiative in so doing as a weapon, the purpose or aim of which is to use the deprivation of work in order to gain concessions from his workers.

In the arbitrator's judgment there are four (4) concomitant, essential requisites, indispensable to a lockout:

First: There is (and must be) a dispute.

Second: The place of employment is closed in whole or in part by the Employer.

Third: The Employer's action (in so doing) is a move on the offensive; and

Fourth: Its purpose is to use such deprivation of employment as an economic weapon to gain concessions from the employees of the Employer.

It is crystal clear that every closing or shutdown of a place of employment by an employer does not constitute a lockout. Absent the critical elements enumerated, there is no lockout within the condemnation of the no lockout pledge of the contract.

32 LA at 840-41. *See also, Great Atlantic & Pacific Tea Co.*, 33 LA 502 (1959 Seitz).

These arbitration cases are virtually unanimous in requiring that for a Union to establish a "lockout" in violation of a contractual "no lockout" clause, that union must establish that the shutdown is being used by the Employer *as an offensive weapon against that union* for the purpose of securing economic concessions *from that union* in the furtherance of a dispute by the Employer *with that union.*

Federal Courts have also held that where there is no dispute between the grieving union and the employer and

where the employer has not closed its business *in order to gain economic concessions* from the grieving union, then the shutdown does not violate the "no strike-no lockout" provision of the contract. In *Brandenburg v. Capitol Distributors Corp.*, 353 F. Supp. 115, 82 LRRM 3004 (S. D. N. Y. 1972), a liquor distributor was experiencing an economic strike staged by its drivers and clerical workers. The distributor then laid off his salesmen who were represented by the Liquor Salesmen's Union. The Liquor Salesmen's Union sought to enjoin the layoff claiming a violation of the "no strike-no lockout" provision of its agreement with the distributor. In denying the motion for injunctive relief the court observed:

> The employer action in this case was not a lockout. The defendants were engaged in no dispute with the plaintiff Union and their actions were not intended to coerce it to grant concessions. *American Ship Bldg. Co. v. NLRB*, 380 U. S. 300, 321, 58 LRRM 2672 (1965) (White, J. concurring); *NLRB v. Great Atlantic & Pacific Tea Co., et al.*, 340 F. 2d 690, 58 LRRM 2232 (2 Cir. 1965); *Local 50, Bakery & Confectionary Workers v. General Baking Co.*, 97 F. Supp. 73, 28 LRRM 2039 (S. D. N. Y. 1951); Cf. *Laclede Gas Co. v. NLRB*, 421 F. 2d 610, 615, 73 LRRM 2364 (8 Cir. 1970). "A lockout is an employer's withholding of work from his employees in order to gain a concession *from them*" (emphasis supplied). Reinstatement, Torts, Sec. 787, comment a.

82 LRRM at 3006. *In accord, News Union v. Hearst Corp.*, 278 F. Supp. 423, 67 LRRM 2303 (D. C. Md. 1968); *Bakery Workers v. General Baking Co.*, 97 F. Supp. 73, 28 LRRM 2039 (S. D. N. Y. 1951).

C. *There is No Dispute Between Acme and the Retail Clerks.*

It is undisputed that there is no collective bargaining dispute between Acme and the Retail Clerks. Rather, the only dispute which now exists is between the Meatcutters and the multi-employer group of which Acme is a member.

Arbitrators who have carefully analyzed the definition of lockout have required that the grieving union prove the existence of a dispute between itself and the respondent company. As Arbitrator Aaron concluded in *Mrs. Conkling's Bakery, supra:*

> It can readily be seen, therefore, that (grievant) was not locked out by the Company. *There was no controversy between the Company and the Operating Engineers* (the grieving union).

15 LA at 171 (emphasis added).

This position is echoed by Arbitrator Peter Seitz in *Great Atlantic & Pacific Tea Co.*, 33 LA 502 (1959), where he denied the Bakery Workers' lockout claim by holding:

> In this case as in the Meatcutters case,[2] *there was no showing* on the record that, at the time the Company ceased operations and denied employment to the grieving employees *there was any labor dispute in progress between them or their Union with the Company.*

33 LA at 505 (emphasis added).

2. This reference is to a similar A & P decision decided by Burton B. Turkus, 32 LA 838 and referred to *supra.*

Also adhering to this principle is *Associated Transport Inc., supra,* wherein Arbitrator Danau denied the grievance for the reason, *inter alia,* that:

> . . . the Company's suspension of its clerical operation was not in aid of any dispute with its office force, either arising from the administration of the agreement or to secure a change in its terms.

50 LA at 237.

In the instant case, it is clear that neither Acme nor the multi-employer bargaining unit is embroiled in any dispute with the Retail Clerks arising from the administration of its agreement or to alter its terms. The grievants have the burden of proof in establishing that there exists a dispute between Acme and the Retail Clerks. In fact, there is no dispute at all between the parties. Based upon the arbitration decisions cited above, this fact *in and of itself* mandates that the Retail Clerks' grievance be denied.

D. *Acme Is Not Engaging in Any Offensive Conduct Against the Retail Clerks Nor Is Its Motive to Gain any Concession from the Retail Clerks.*

As previously stated, the definition of a lockout requires, as a *sine qua non,* that the grieving union prove that the Employer be engaged in offensive conduct, as opposed to defensive reaction, for the purpose of *obtaining a concession from that grieving union.* Each of the previously cited cases has required such a finding before a "lockout" could be proven. Additionally, in *H. H. Robertson Co.*, 66 LA 1150 (1976 Torosian), the Arbitrator held:

> Given the above facts, the Arbitrator is not convinced the Company violated the no-lockout provision

> of the collective bargaining agreement as argued by the Union. Lacking in the instant case is a motive or an intent by the Employer to gain a concession from the sheet metal workers (the grieving union).

66 LA at 1157.

As noted earlier, this view has been consistently applied by Peter Seitz, as well as by virtually all arbitrators who have confronted this problem, in deciding such an issue. *See*, for example, *Great Atlantic & Pacific Tea Co., supra,* wherein Arbitrator Seitz concluded:

> . . . further, it is abundantly clear that the cessation of operations had no relation to any endeavor on the part of the Company to obtain concessions from these employees or their Union.

33 LA at 505. (*See, also,* arbitration cases cited under section II(B) of this brief, *supra*). Federal Courts have similarly adopted the same requirement that "the Employer's withholding of work from his employees (must be) in order to gain a concession *from them*". *News Union v. Hearst Corp.*, 278 F. Supp. 423, 67 LRRM 2303, 2307 (D. Md. 1968). *See also Brandenburg v. Capitol Distributor Corp.*, 353 F. Supp. 115, 82 LRRM 3004 (S. D. N. Y. 1972); *Bakery Workers Local 50 v. General Baking Co.*, 28 LRRM 2039 (S. D. N. Y. 1951).

Applying this crucial test to the instant case discloses that Acme's conduct in closing the stores was not offensive action. Furthermore, it is crucial to note that Acme's *purpose* in closing its stores is not *in any way* designed to seek a concession, economic or otherwise, from the Retail Clerks. The Retail Clerks' employment relationship at Acme, as well as at A&P and Food Fair, is governed by the terms and conditions of an existing collective bargaining agreement which runs through January 28, 1978. Acme is not seeking any alteration of that agreement, nor presumably are the Retail Clerks.

As can be seen from the facts, Acme's closing of its stores was a defensive reaction dictated by the strike of the Meatcutters and the Retail Clerks' conduct in support of that strike. As the facts disclose, the Retail Clerks have honored Meatcutter picket lines at Food Fair and at Acme wherever and whenever they have appeared. Such conduct by the Retail Clerks demonstrates their total allegiance to the striking Meatcutters. Acme *as a defense* to this conduct was forced to make an economic decision which resulted in the closing of its stores. In no way was that decision offensive in nature vis-à-vis the Retail Clerks, or for that matter, against the Meatcutters. As Arbitrator Seitz concluded, the Retail Clerks must establish that the Company has engaged in "an aggressive act aimed at the Union calculated and with the purpose of wresting concessions." 43 LA at 300. This cannot be established in the instant case.

Since Acme has engaged in no offensive action and seeks no concession from the Retail Clerks, this fact alone requires that the grievance be denied.

E. *Economic Justification for a Total Closedown of Acme's Stores in the Face of Picketing or Even the Potential of Picketing by the Meatcutters with the Resultant Allied Activity by the Retail Clerks.*

An important factor leading to Acme's decision to close its stores is the economic uncertainty and unpredictability created by the actions of the Meatcutters and Retail Clerks. As the record discloses, when Meatcutter pickets appeared at Food Fair, Retail Clerks consistently and continually refused to cross the picket line and, hence, refused

to work. Consequently, Food Fair was forced to close its stores. Similarly, when Meatcutter pickets appeared at certain of *Acme's stores* on Tuesday, March 8, 1977, the clerks at those stores *ceased working* until the pickets departed. Consequently, it is clear that the Retail Clerks' actions evidence that they will consistently honor Meatcutter picket lines during the strike wherever they appear. Thus, Acme's operating ability—even without Meatcutters—is placed at the whim of the Meatcutters. Any time that the Meatcutters would wish to hold up operations at one, some, or all of Acme's stores, it need only picket that store and it is assured that the Retail Clerks, to say nothing of the Teamsters who deliver the store products, will not cross that line. The likelihood of such pickets being extended to Acme's stores is increased by the fact that these Meatcutters are no longer working at Acme during the labor dispute.

Consequently, Acme was faced with the alternative of closing the stores or playing Russian Roulette. If it simply waited for the Meatcutters to picket it, selectively or totally, it would create an economic loss to Acme by creating an unscheduled interruption in the operation of its stores as well as cause ill feeling by consumers. Rather, an orderly, scheduled shutdown enabled Acme to avoid such losses.

Acme cannot be required to remain inactive until the Meatcutters decide to pull the trigger. As Arbitrator Turkus wrote in *A&P*, 32 LA at 841 (emphasis added):

> . . . An employer is not prohibited from taking reasonable measures, including closing down its operations, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption.
>
> The right to close its operations under these circumstances is not limited to the precise moment that the economic loss or impact becomes wholly disastrous or insufferable. It is not the degree of the felt economic loss that is all controlling. It is enough that an economic loss is then slight, when it is accompanied by a well-founded conviction that the losses will progressively and cumulatively expand and intensify. No Employer is justly chargeable with a lockout under such circumstances nor can it *be deprived of the privilege of defending itself from economic loss by utilizing the most effective measures within the law to reasonably limit or curtail its losses.*

Consequently, from the point of view of efficient, economic operations, this factor weighed heavily in the decision of Acme to close its stores.

III. Conclusion.

Therefore, based upon the foregoing, Acme Markets, Inc. submits that the grievances must be denied.

Respectfully submitted,

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By_____
Robert J. Bray, Jr.

By_____
William W. Patten, II

By_____
Alfred J. D'Angelo, Jr.

MEMORANDUM OF RETAIL CLERKS LOCAL 1349 TO ARBITRATOR.

In the matter of
RETAIL CLERKS LOCALS 1349, 1358, 1360, 1361, 1371 and 1393
and
ACME MARKETS, INC. and THE GREAT ATLANTIC & PACIFIC TEA COMPANY
MEMORANDUM TO ARBITRATOR.

Introduction.

This matter is before the arbitrator pursuant to the terms of a Collective Bargaining Agreement between the Retail Clerks Locals 1349, 1358, 1360, 1361, 1371 and 1393 with Acme Markets, Inc. (hereinafter referred to as Acme) and The Great Atlantic & Pacific Tea Company (hereinafter referred to as A&P). The hearing is being held pursuant to expedited arbitration provisions of the current Collective Bargaining Agreement.

Applicable Contractual Language.

Article XXIII

1. The parties agree that there shall be no authorized strikes, stoppages of work, slowdowns, lockouts, or any other interferences of whatsoever nature during the life of this Agreement.

2. Nothing herein contained, however, shall compel any employee to walk through a picket line set up by the Local Unions, parties to this Agreement; Meat Cutters Retail Joint Council of Philadelphia and Vicinity; Philadelphia Teamsters Locals #500, 169, 463; and American Bakery and Confectionery Workers Local #492, 6; provided said strike has received written approval of the International Unions affiliated with the Local Unions indicated above.

Article XI

6. In the alternative, either party in the event of an alleged or asserted breach of Article XXIII may institute expedited arbitration by telegram to American Arbitration Association and the other party, and American Arbitration Association shall designate the Arbitrator within twenty-four (24) hours of receipt of telegram. The Arbitrator shall promptly hold the hearing but in no event later than twenty-four (24) hours after the receipt of notice. The Award of the Arbitrator shall issue forthwith and in no event later than three (3) hours after conclusion of the hearing. The Award of the Arbitrator shall be in writing and may be issued without opinion. If any party desires an opinion, one shall be issued, but its issuance shall not delay compliance with the enforcement of the Award. The Arbitrator may award injunctive relief and other appropriate relief. Failure of any party to attend arbitration hearing as scheduled and noticed by American Arbitration Association shall not delay arbitration and Arbitrator is authorized to proceed to take evidence as if such party was present. Enforcement of such an Award by a Court of Law is not precluded by election of this alternative procedure.

FACTS.

Acme, Food Fair and A&P are participating members of the Philadelphia Food Store Employers' Labor Council, a multi-employer bargaining association. This association negotiates collective bargaining agreements with various labor organizations throughout the Greater Delaware Valley. It has separate contracts with the Meatcutters Union covering Meat Department employees, including Meatcutters and Meat Wrappers as well as Delicatessen Department employees. Another contract exists between the companies and various local unions of the Retail Clerks, covering all other employees employed in the supermarkets.

On or about March 6, 1977, a strike was called by the Meatcutters Retail Joint Council of Philadelphia & Vicinity against Food Fair. Although no strike action took place by the Meatcutters at Acme and A&P, on March 9, 1977, those companies locked out all Meat Department employees. In addition, Acme and A&P shut down all of their stores, locking out Retail Clerk Union members even though the Retail Clerks' contract does not expire until January 21, 1978.

The current contract between A&P and Acme and the Retail Clerks contains a broad no lockout clause (Article XXIII).

The nature and operation of the supermarkets are such that the Meat Department functions separately from the remainded of the store which includes the Grocery, Dairy, Frozen Food and Produce Sections. The Meat Department cases and coolers are lined against a wall of the store. Meat is placed in these cases by Meat Department personnel for selection by customers. The remainder of the store includes aisles with groceries, frozen food items, dairy and produce. Cashiers represented by the Retail Clerks Unions operate at the front end of the store. There

are no cashiers in the Meat Department. The clerks in the store unload, stock, and mark merchandise. The Meat Department employees represent a small fraction of the total complement of employees who work in the store. The overwhelming number of these employees are clerks. The Meat Department normally produces 20 to 25 percent of the gross volume of business done at the store. The remainder of the store, which is in the nature of Retail Clerks' work, represents between 75 to 80 percent of the gross volume of business.

During a work stoppage by Meatcutters in the past (sometime in approximately 1960-61) the company continued operating its stores. The situation in the supermarkets is such that there is no necessity to train, reschedule, or otherwise alter the operation of the store when the Meat Department is closed. All that occurs is that meat is not placed in the meat cases for customer selection. In all other respects, the enterprise functions as it normally would and can remain open. In the instant situation, the companies decided to shut down the entire operation. It is because of that decision that the unions are urging that an improper lockout is taking place.

ARGUMENT.

The companies breached their promise not to lockout employees covered by the Retail Clerks Agreement, when they refused to allow Retail Clerk members to work as a result of their labor dispute with the Meatcutters Union.

For the purpose of this argument only, we are assuming that the lockout of the Meat Department employees at Acme and A&P was lawful and in accordance with the case of *Buffalo Linen Supply Co.*, 353 U. S. 87. That case permits employers who are part of a multi-employer bargaining association to lockout bargaining unit employees when the negotiating union strikes one of the Association

members and not the others. This whipsaw tactic by the union is viewed as threatening the structure and existence of the employer's bargaining device, i.e., the multi-employer association. Therefore, the lockout by the other employers who have not been struck is viewed as a defensive measure to preserve the bargaining entity. Thus, when the Meatcutters struck Food Fair, both A&P and Acme, in order to protect the Philadelphia Food Store Employers Labor Council bargaining association, could lockout its Meat Department employees.

However, the companies went further. They locked out Retail Clerks members who are not parties to the current bargaining. Indeed, the Retail Clerks contract does not expire until 1978.

The basic question before the Arbitrator then is whether the company violated the contract by locking out (i.e., refusing to allow to work) Retail Clerk unit employees.

Over the years the term "lockout" has been defined through the common law of arbitration in situations where there is a striking union and the employer has refused to allow non-striking union members to continue working. The basic elements in this situation consists of:

1. The existence of a dispute.
2. Offensive employer action.
3. The purpose of which action is to use the locked out union employees as leverage to gain concessions from the striking employees.

In addition, it is required that work for the non-striking union employees can be performed despite the strike.[1]

1. Arbitrators also find that the company's action in locking out is not in violation of a contract where it was done in order to prevent violence at the picket line where there has been a history of such violence. This defense is not pertinent here.

See *Columbus Showcase Co.*, 64 LA 1149 (Leach); *Associated Transport*, 50 LA 236 (Dunau); *Akers Motor Lines*, 51 LA 955 (Dunau); *Michigan Lathing & Plastering Contractors Association*, 52 LA 997 (Hewlett); *Bell Aerosystems Co.*, 54 LA 745 (Seitz); *Nevada Resort Association*, 56 LA 1263 (Cohen).

Applying these principles to the current situation, we find:

1. A current dispute exists with the Meatcutters and A&P and Acme. In addition, because of the companies' own actions, a dispute also exists with the Retail Clerks by virtue of the companies' refusal to allow the Retail Clerks members to work.

2. The companies' action was offensive as directed against the Retail Clerks. Here the lockout was not to defend the companies' bargaining association cohesiveness since that could have been and was accomplished by locking out the Meatcutters with whom the negotiations dispute existed. It was the Meatcutters who were whipsawing by striking Food Fair. A lockout against the Retail Clerks, not being a party to the contract negotiations, nor in any way challenging the multi-employer association bargaining, cannot be deemed a defensive act. Necessarily, it must be characterized as offensive. In this regard, it should be noted that on March 9, 1977, when Retail Clerk members reported to work at the various Acme Markets, store managers read them a statement indicating that the stores would not be open and that they would not be permitted to work. Therefore, we are clearly dealing with the employers' direct offensive action.

3. The Retail Clerks members performing 75 to 80 percent of the gross business done in the store, and being able to function operationally without the Meat Depart-

ment could only have been locked out in order to hasten the conclusion of the Meatcutters strike by adding additional leverage and pressure against that union. There can be no economic, operational, or production justification for shutting down the entire supermarket operation merely because the Meat Department was to be closed. In support of our position, we refer to pertinent arbitration awards regarding the subject of lockouts.

In *Akers Motor Lines, Inc., supra,* Arbitrator Dunau had before him an employer who was a part of a multi-employer association. The Teamsters struck one of the employers of the group and others, including Akers, locked out their drivers and warehousemen. In addition, they locked out maintenance employees covered under another union's contract. Arbitrator Dunau held that the lockout was a breach of the contract because there was work available that could have been done by the maintenance employees. Dunau viewed the burden to be on the employer to justify its action when the company could have continued to use maintenance employees although the other employees represented by a different union were on strike. He stated that, "An agreement which forbids a lockout to bring the suspended employees to terms surely forbids a lockout in which the suspension of one group of employees, with whom the employer has no dispute, is used as a lever to gain a concession from another group of employees, with whom the employer does have a dispute." The case is of further significance in view of Dunau's opposite result dealing with a similar fact setting in *Associated Transport, supra.* There the arbitrator held that the non-striking clerical employees did not have a claim for breach of the no lockout clause of their union contract where the driver and warehouse strike eliminated the need for their services, since clerical work was dependent and tied to the activities of the drivers and warehousemen. Using the *Akers Motor Lines* and *Associated Transport* analysis as applied to the current set of facts, the result would have to be a finding that the companies did improperly and in violation of the collective bargaining agreement, lock out the Retail Clerks members. As will be seen later, there was work available for the Retail Clerks that could have been performed during the strike with the Meatcutters. There was no economic or other production justification by the employer to deprive the Retail Clerks members of work. Therefore, it may be concluded that the lockout of the Retail Clerks members was designed to "be used as a lever to gain a concession from another group of employees, with whom the employer does have a dispute". In this case, the Meatcutters.

In *Nevada Resort Association, supra,* the Culinary Union struck three Las Vegas hotels out of a larger group who were members of a multi-employer association of hotels and gambling casinos on the Strip. The non-striking unions endorsed the Culinary strike against the three struck hotels. The remainder of the employer association members locked out the Culinary Union members as well as AGVA, Musicians, and the IATSE members. These Unions claimed a breach of the no lockout clause since their members sought to work and were not on strike. The arbitrator held that as to the three hotels where the strike was supported, the non-striking unions had no complaint, but where they were locked out by non-struck employer members of the Association, it was an illegal lockout, offensive in nature and a violation of the contract as to the non-striking union members.

In *Consolidated Freightways Corp.*, 51 LA 603, Arbitrator Wyckoff held that although the association employer properly locked out striking union members in support of multi-employer bargaining, it violated its no-lockout promise to a non-striking clerical unit of employees who were

covered by another collective bargaining agreement. He found that there was clerical work available to be done despite the lockout of the striking union's members.

In *Columbus Showcase Co., supra*, the company dealt with several unions within a single plant. One of them remained on strike while the others sought to work. The company locked out the remaining unions. The arbitrator found this to be a violation of the no-lockout clauses of the collective bargaining agreement since "There was no operating necessity to close the plant, such as has frequently been held by other arbitrators to avoid the no-lockout provision of a contract." Again, this is substantially the same situation here. We assert there was no operating necessity to close the stores. That determination was a matter of management's offensive action. Because of the lack of operating necessity, it follows and must be concluded that it was designed to bring pressure to the bargaining table against the Meatcutters.

We call the arbitrator's attention to the *Acme Markets* case, 43 LA 294 (Seitz) which concerned the converse of the present situation. There, a strike was in progress by the Retail Clerks in the Baltimore, Maryland area, which caused Acme Markets to lock out the non-striking Meat Department employees. Seitz found the lockout not to be in breach of the non-striking Meatcutters agreement. However, the case is distinguishable. Although it is true as Seitz suggested, that the operation of the Meat Department without the remainder of the store present and functioning would require special "measures to keep the public out of the grocery and other areas of the supermarket and involve the initiation or modification of a number of other arrangements in order that business might be carried on with a reasonable degree of efficiency, profit, and security," the reverse is not true. That is to say, the stores could and

have operated without the Meat Departments being open. Therefore, the Seitz opinion falls within those lockout cases where arbitrators have held that work claimed by the locked out union is so dependent upon the striking union's employees being available to do their jobs that the company had production needs to shut down the operation in its entirety. This situation does not breach the no-lockout clause of the contract since the lockout is not "offensive" in view of this production reality. *Oak Tree Racing Association*, 62 LA 843 (Block); *Brown & Williamson Tobacco Corp.*, 72-1 Arb. ¶ 8164.

Seitz was not looking at the current situation where the Clerks are all willing to work, open and close the store, man the registers, ring up sales, redeem coupons, cash checks, bag food for customers, clean that part of the store customers pass through, clean lavatories, pick up money for registers, prepare money for deposit and bank it, stock shelves, mark prices, prepare produce, and otherwise keep the store fully functional. The reality of this situation is that the entire store is operationally functional even without the Meat Department being open. Because there was no economic or production reason to shut the stores down entirely, we submit that the purpose of the lockout was to bring pressure upon the Meatcutters through the lockout of the Retail Clerks.

Another aspect of the current contract not considered by Seitz but worthy of the arbitrator's attention, is paragraph 2 of Article XXIII which specifically gives the right to Retail Clerk members to honor Meatcutter picket lines. This is of significance since it obviously contemplates a situation where there is a picket line at a store that is placed there by the Meatcutters during a strike against the company. Clearly, this language would have no meaning unless the parties understood that the company could

operate its stores in the face of a strike by the Meatcutters, allowing the decision of whether to work to be made by the Retail Clerks member. Obviously, if the parties understood that the stores were to be closed in the event of a Meatcutter strike, it would make no sense to allow for the honoring of a picket line by employees in the event of such a strike.

This analysis was made in a similar matter by Arbitrator Leach in the case of *Columbus Showcase*. He wrote:

> "Article XIV of the Agreement contains a strict no strike—no lockout provision with one exception, i.e., refusal of the other party to arbitrate a dispute. An additional provision is contained, operating in favor of the Union, under which its members are permitted to withhold their labor in the event of an authorized strike by another union with the attendant posting of pickets. *That provision demonstrates that the parties negotiated with the action between other unions and the company in mind. The result of the negotiated language is that the members of this Union are permitted to withhold their labor where the relationship of the company and other unions result in a strike but no similar provision authorizes the company to deprive the Union members of work in correlative circumstances.*

The result may be somewhat one-sided but that is for the parties to resolve in negotiations, not one to be rectified in arbitration.

It follows that the parties did not limit the no-lockout provision to factors arising exclusively out of dealings between the two parties only. The recognition of other causes that would excuse union members, too clearly shows the general contemplation by the parties of the complexities arising from the presence of various unions in the plant. *The no-lockout provision, therefore, protects the union members notwithstanding that the source of the trouble might relate to matters between the company and another union."*

In addition to these reasons for distinguishing the Seitz award, we have a basic disagreement between his analysis and that of other arbitrators viewing situations where a lockout occurs against a non-striking union's members in the face of another union's strike. Seitz, perhaps because of the approach taken by the union before him, seemed to focus on whether the cessation of work for the non-striking union members was designed to get concessions from that union. So, he and the parties made much about whether or not the company's lockout had to do with trying to get concessions from the non-striking union in anticipation of its bargaining which was to take place nine months later. Apparently, this approach was based on the theory set forth in Burton Turkus' award in *The Great Atlantic & Pacific Tea Company* case, 32 LA 838 referred to by Seitz. He enumerated as one of the necessary items of a lockout, the purpose of the company being to obtain concessions from the locked out employees. But we suggest that this analysis is in error and is contrary to the more soundly reasoned approach that lockout pressure on a non-striking union may also be viewed as leverage on the striking union members, such pressure, being itself improper, thereby being considered a violation of the no-lockout provision. In fact, that is the actuality of the situation. It is naive to believe that locking out of Retail Clerks will not generate heat by those employees on the striking Meatcutters. So it is that contrary to Seitz and Turkus, arbitrators have specifically rejected the argument that the lockout, to be a violation, has to be designed to

extract concessions from the locked out employees, and not from any others. See *Columbus Showcase, supra; Akers Motor Lines, supra.* Interestingly, arbitrator Leach in the *Columbus Showcase* compared the locking out of a non-striking union to the situation of a neutral employer having secondary pressure unlawfully placed against him to bring pressure on the primary employer target. Thus, the lockout of the neutral non-striking union members is designed to improperly coerce it to pressure the striking union to settle its dispute with the company.

Another difference between the Seitz analysis and that of other arbitrators is the view that the union has the burden of showing that the company's motive was improper in that the company was locking out to extract concessions and the union had to prove this somehow. Our reading of the cases cited shows this approach by Seitz to be unique. In all other cases, the arbitrators have ruled for the company, only after *the company* was able to supply justifiable defenses for shutting out non-striking employees. Those defenses included the prevention of excessive harm and injury to non-striking persons who might try to cross a picket line where a history of violence existed, *Bell Aerosystems Co.*, 54 LA 745; the interrelationship between the work of the striking employees and the non-striking employees which made it extremely difficult, if not impossible for the non-striking employees to do any of their work; *Oak Tree Racing Association*, 62 LA 843; or because of the strike, there was no work available to be done by the non-strikers. *Associated Transport Company*, 50 LA 236.

Actually, Seitz' Award can be read in the mainstream of arbitrator views, since, in fact Acme, the Company in the case before him, showed that the Meat Department could not function without the presence and assistance

of Retail Clerk striking employees. This is a recognized *affirmative defense.* He did not consider what is now before the arbitrator here. We submit, that Acme and A&P will not be able to establish that they could not have operated without the Meat Department. Therefore, the lockout can be said to be without economic justification. This being so, it is offensive and designed to effect and influence events at the bargaining table between the companies and the Meatcutters in violation of the contract.

Remedy

The contract specifically provides in Article XI, Section 6 that the arbitrator has the authority to issue an injunction against the party in violation of the no-lockout provision. The Unions are therefore applying to the arbitrator for an injunction ordering Acme and A&P to cease and desist from locking out its Retail Clerks' employees. In addition, we are seeking damages in the nature of lost earnings for each day of work that employees lost during the lockout. See *Lathing & Plastering Contractors Co.*, 56 LA 281.

Tomar, Parks, Seliger,
Simonoff & Adourian
By: /s/ Howard S. Simonoff

HSS: ea 3/14/77

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EXCERPTS FROM PROCEEDINGS BEFORE ARBITRATOR.

PROCEEDINGS

The Arbitrator: All right. I guess we are ready. Howard, do you want to lead it off?

Mr. Simonoff: Mr. Gill, this is an arbitration that is being conducted pursuant to Collective Bargaining Agreement between the Retail Clerks' various locals and Acme Markets, Inc. and The Great Atlantic & Pacific Tea Company. And we are here on the basis of an expedited arbitration provision that appears in Article 11 of the Collective Bargaining Agreement, Paragraph 6, which expresses the authority for the arbitrator, which includes, among other things, the power of injunction and also directs that the arbitrator shall issue forthwith and in no event later than after three hours of the conclusion of the hearing his determination of the issues presented. I call it to your

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attention right at the outset.

The reason that we are here and the reason that this expedited procedure is applicable is because we are asserting that there is a violation of the No Lockout provision of the Collective Bargaining Agreement, which appears in Article 23, Paragraph 1 of the contract. The case starts with a labor dispute between these companies and the Meat Cutters Union, who are parties to another separate collective bargaining agreement covering meat de-

partment employees in not only these two chains but also the Food Fair chain. These negotiations are still going on.

On March the 6th, 1977, the meat cutters went on strike against Food Fair. On March the 9th, A&P and Acme locked out not only the meat department personnel but also locked out all the employees covered by the Retail Clerks Collective Bargaining Agreement.

It is our position that for purposes of this arbitration case, the locking out of the meat departments may have been appropriate defensive lockout action under the commonly known Buffalo Linen Doctrine, but that the locking out of the retail clerks was in violation of the Collective Bargaining Agreement and is

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not supportable at law or in the traditional evaluations made by arbitrators within the context of this kind of a case. The situation with regard to locking out the meat departments and the other chains focuses on the preservation of the Multi-Employer Bargaining Association concept, vis-a-vis, meat cutters as the primary disputants. Here the lockout pertains to the retail clerks as well, who are not disputants in this labor relations matter between the meat cutters and the competing employers.

It is our position that such a lockout is a clear violation of the contract, and we are seeking injunction relief and we are seeking damages for loss of earnings. We submitted a pretrial memorandum which indicates certain requirements are looked for by arbitrators before finding out violations of this kind of Collective Bargaining Agreement. It is our view that the events themselves shout loudly that this is a violation.

We have a situation here where the chains that are involved, the A&P and Acme, can function without meat departments. And, if necessary, we will produce evidence to indicate that the operation

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of the meat department is really independent from the operation of the remainder of the store, and that, indeed, the store can function without a meat department at the present; so that consumers can come in and shop and make their purchases; so that aisles can be stocked and prices marked on merchandise, and in all other ways the stores are operational and functionally operable.

This is one of the traditional defenses that employees use; that is to say, that the interaction of the struck union with the nonstruck employers is such that there cannot be production in the facility. But it is our view that this is not present here.

Our people were ready and willing to work. They reported for work. They were read a statement by the managers of the respective stores telling them that work would not be made available to them. The meat cutters have made it clear from the very outset that the strike is against Food Fair only. They have not placed picketing at the stores of Food Fair or A&P. Our understanding is initially there were some sporadic pickets at a very small number of stores, I think a handful of stores at most. And we are dealing in excess of 300 stores here, where certain pickets did appear but

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were called off when the meat cutters learned that they were there, because they were not authorized to be at

A&P and Acme chains. So that it is not the presence of pickets that induced the employer to close down or the fear that there would be violence that induced the employer to close down. And these too are defenses that are recognized by arbitrators, which defenses are not apparent here.

Now, we will have testimony, if necessary, that the meat cutters have indicated during the negotiations that they were not picketing or striking any of the A&P and Acme locations. And we are prepared to remove any pickets, if there were pickets who appeared improperly without authorization at these locations. Under these circumstances, we believe that the reason that the retail clerks were locked out was in order to put additional pressure on the bargaining meat cutters to settle the dispute. And in this regard, it is important to note that one of the issues at the bargaining table that it not yet resolved between the meat cutters and these employers is the question of premium pay for Saturday and Sunday work, which is absent in the retail clerks' contract to the extent that

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it appears in the current meat cutters former contract. That is to say that the employers are seeking to have this premium pay paid synonymous with the retail clerk contract. It is our view that the reason the lockout occurred with regard to the retail clerk members was to exert that much more additional pressure upon the meat cutters to settle in accordance with the requirements of the employers in their position at the bargaining table. This motivation falls squarely within the requirement of arbitrators, when they look at why the employer has locked employees out.

This was not a defensive lockout. This was an offensive lockout. There is nothing here that is done with regard to the retail clerks that preserves the employers' bargaining unit posture. There was nothing here done

with regard to the retail clerks, other than to be used as a device or weapon to cause the meat cutters to yield.

Now, in addition, I think it should be noted that the same Article 23 provides specifically that the retail clerks can honor picket lines placed at locations when there are strikers from the meat cutters at various locations. And with this, that is significant.

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And we have referred to cases in our memorandum indicating that arbitrators that viewed that to indicate that it must have been contemplated by the parties that the enterprises could continue to function could continue to operate. Else why have a provision that honoring the picket line is appropriate to the employee. That is to say, in contemplation of a picket line appearing by the meat cutters, a retail clerk will honor that picket line. The only reason that he would honor the picket line was because the store was remaining operational during that period. It seems to us, therefore, that the contract contemplates that the employer will not lock out. The choice and option of whether to honor the picket line is exclusively that of the employees.

We particularly call your attention to the contract language that is very broad as to what the Lockout Provision says. It particularly says, the parties agree that there shall be no authorized strike stoppages of work, slowdowns, lockouts or any other interference of whatsoever nature during the life of this agreement. This is very broad language and it is encompassed in the specific expedited machinery. If the arbitrator were confronted with a breach of our

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No-Strike Clause, if this was reversed and they were in here on an expedited basis, the employer would be saying

how dire things were, that he needed an injunction right away to prevent the injunction of the No-Strike Clause.

We feel just as strongly we have many of our employees out of work because of the action of the employer, which we think is improper action. This is the tantamount to the same consequence on the union side that is suffered by an employer when there is a violation of a no-strike clause.

We are therefore seeking injunctive relief and back pay for the damages of lost earnings for the period that this lockout is in progress.

The Arbitrator: Just before you go ahead, let me just be clear about the procedure.

I have not seen this expedited arbitration before five minutes ago when you showed it to me. And I think we should be clear about the ground rules here. I noticed it says that the hearing shall be held no later than 24 hours after receipt of the Notice from the moving party to the AAA, and I assume that position has been waived, or else we can all go home now if it

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has not been. I assume because of the difficulty in scheduling, that provision was waived. Am I right about that?

Mr. Simonoff: That is correct.

The Arbitrator: And I guess this is not the time to bring up the next sentence, which says the decision shall be issued no later than three hours after the conclusion of the hearing. I think we want to have an understanding on that when we finish here today, particularly with reference to when I am expected to study the transcript, which would make it impossible to meet the three hour deadline. That is all I have at the moment.

Mr. Katz: Well, I just want to imply with a few words, it is certainly on behalf of 1357, I am happy to

adopt the airtight product that Howard has submitted to you and to adopt his general comments, except that it would seem to me that this dispute is a very simple one and there really should not be any dispute. There are no exceptions and there are no defenses whatsoever set out for justification to a lockout. The provision does not say that the employer is barred from a "unjustified" lockout. There is a

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total absolute prohibition upon engaging in a lockout. And I would not see fit to advance any comments on defenses, because I don't think that there can be any defense to the fact that, without dispute, the employers in this case made a labor relations decision; that it would be to their best interest, for whatever reason they saw fit, to deny work to the retail clerks bargaining units in all the stores throughout the chains covered by this Collective Bargaining Agreement. And it would seem to me that that is the case in the nutshell and there is very little that has to be presented to you, especially where you see that where the parties were concerned, that employment protections should, in some way, be waived by a strike of another bargaining unit.

They took great care to spell it out, as they did in the advance layoff notice that appears in Paragraph C, where for purposes of a layoff, strikes can cause a lack of advance notice. Now, if they put it in there for purposes of a layout, did not put it in the justification for the lockout, then the basic doctrine of—what is it lawyers like to say—expressio unius est exclusio alterius, which means you have no

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areas in which you can express "justification" for lockout.

There has been a lockout. The clerks came; they were ready to work. There were no pickets there and the doors were shut. And that is the whole case and you can get the decision out in three hours by ending the hearing in ten minutes.

The Arbitrator: Okay, gentlemen.

Mr. Kleeb: Let me restate the picture a little bit. First, we have to bear in mind that we have two bargaining units; the Meat Cutters Unit, a single unit, one contract, and the Retail Clerks Unit, one unit and a contract. The fact that there is multi-unions and multi-employers as parties makes no difference because in one contract there is an employer and in one contract there is a union, in the other contract there is an employer and in the other contract there is a union. The meat cutters contract terminated. As a result of an impasse and a strike, a legal economic strike was declared on the 6th of March, Sunday. It was announced before and at that time that the meat cutters' strike was directed at only one of the employers, one segment of the employer, and that was

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Mr. Simonoff: No objection.

The Arbitrator: All right, go ahead with your closing arguments.

Mr. Kleeb: Do you want to make further arguments? We just want to be sure that we did not close our opportunity.

Mr. Simonoff: I would like to make a few remarks without repeating what I said earlier and with the understanding that you will have access to the brief that we submitted in advance.

The Arbitrator: Yes. I have three of them. I assume you all have copies of all three, your brief, the Acme brief and the A&P brief; right?

Mr. Simonoff: We would like to adopt those remarks into our brief as part of our closing argument. But I would like to add to it the following: As I understood the employers' position, it is that the retail clerks were so enmeshed with the meat cutters in this meat cutter dispute with Food Fair and the remainder of the chains by virtue of the lockout so as to justify the employer in locking out the retail clerks bargaining unit members at A&P and Acme.

I have problems with the arguments on

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two accounts. First of all, it strikes me that it is, in effect, saying that the retail clerks could have, on that theory that they were so enmeshed and allied with the meat cutters, taken action against the chains just because of the meat cutters' strike against Pantry Pride. That is to say, if it is true that they can be locked out because of anticipation of what may happen with regard to the meat cutters, then the retail clerks could independently take such action before any meat cutters showed up and not be in violation of the no strike obligation of the retail clerks. So, for example, if the retail clerks said, "We support the meat cutters in their efforts against Food Fair," and thereby said to Acme and A&P, "We are supporting this action of Food Fair by the meat cutters and we are going to go out here at your stores," by logical extension of the employers' argument that would not have been a breach of the no strike promise to A&P and Acme.

The converse is exactly what they are saying. They are saying that they can lock us out because of a dispute

between the meat cutters and Food Fair. And what they are saying is that they can project that particular action against the retail clerks in

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anticipation of anything that may have happened with the meat cutters. I don't think that factually they can. I don't think that contractually they can.

And we rely not only on the no strike clause but on the specific promise that we have from each of these employers that we can honor lines put up by the meat cutters at their various sites. And I think that that is a major distinction from many of these cases.

I call your attention in particular to a case that we pointed this out in our brief, which is the Columbus Showcase matter, where the arbitrator pointed to this provision of an agreement where the employees had a right to refrain from crossing of a picket line. And he said, that provision demonstrates that the parties negotiated with the action between other unions and the company in mind. The result of the negotiated action is that the members of this union are permitted to withhold their labor where the relationship of the company and other unions result in a strike. But no similar provision authorizes the company to deprive the union members of work in correlative circumstances. And that is precisely what is

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happening here. The company is depriving us of work even though they have agreed that we have the right to honor the picket line. But they have not got the right to lock us out.

Now, in other cases that we have argued, which is an extension of the Dunau doctrine, there is an analogy made between this type of situation, vis-a-vis a lockout of

a union who is a neutral nonparticipant in a labor dispute and a secondary boycott against a mutual employer where improper pressure is being brought upon the neutral to cause the neutral to do something that would affect participants in the labor dispute. And that is precisely what is happening here.

We have a relatively small bargaining unit, vis-a-vis, the meat cutters and the employers. And we have a substantially group when you are dealing with the retail clerks' unit. The employer is putting pressure through the retail clerks' lockout on the bargaining that is going on between the meat cutters and the Food Council. And we are really being used in that way to exercise that kind of pressure. I think it is significant that both Dunau's approach and the other arbitrators' approaches indicate that we have to be

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locked out in order to extract something from one of the disputants in the labor dispute, because it seems to me in this case the employer has conceded that the reason that it has locked us out is not to do with economics, is not to do with being able to operate the stores. It has to do with their labor relations posture at the bargaining table. That is really what it is. They have said it over and over again, that what we have before the arbitrator is what they call a defensive action with regard to locking out. But that defensive action, which is lawful against the meat cutters who are on strike against them, is not defensive action with regard to the retail clerks, because the retail clerks are not attacking their multi-employer association status. They are not even involved in this labor dispute. And it is the whole crux that they are trying to extend the Buffalo Linen concept with regard to a disputant to a nondisputant who is not involved, and say by some means

of rationalization that they can bring us into that dispute. And I really don't think that that is a viable argument. They have a promise with the clerks that they won't lock us out, and that promise does not depend on what the meat cutters do.

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And that is what they are trying to make it depend upon. I think also it is clear that from the testimony and from the position of the employers that they have agreed that a strike against one is a strike against all. But in what context? In the context of a meat cutters' strike. The clerks are not on strike. And where there are picket lines that they are honoring, they have a right to honor those picket lines. The employer is saying, "Well, they are honoring the picket line and therefore they are now allied with the meat cutters." I think that is stretching well beyond what is the fact here.

The Food Council has indicated that they support the meat cutters in their action. But what is the action of the meat cutters; to strike Food Fair, not to strike A&P. And certainly they are in support of that action. But it is a long reach to go from that to say that we are, in effect, working as allies with the meat cutters in their dispute with the chains. We have indicated a willingness to work at Acme and A&P. And it is only but for the employers' action to refuse us that work and we are not working. We would all be working there, every one of us, but for that

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determination. And that is offensive. It is offensive because it has nothing to do with any kind of a situation in terms of operating the stores. There is not any testimony that these stores could not have operated. There is not

any testimony at all. The only thing we have or the only position we have is that they are doing this to preserve this multi-employer bargaining posture. And that is, I think clear from the arbitrators' decisions that that is not a defense as to the mutual participant in a labor dispute.

The companies also argue that they are doing this because they anticipate that if a picket line shows up from the meat cutters, the clerks are going to honor it. Joe Nettleton testified today and I did not hear any contradiction that the meat cutters are not going to be sending any picket line to Acme, they are not going to be sending any picket line to A&P. When he learned that action was taken by some persons unauthorized to do so, they were immediately instructed to discontinue that action. So we know that those picket lines are not going to exist. And yet, the company is saying that they could reasonably surmise that this was going to happen, and therefore,

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they could take steps to lock the retail clerks out in anticipation of that. But we suggest to you that that is just not a viable argument in face of Mr. Nettleton's testimony. That's not going to happen. So that, again, we are dealing with just some conjecture on the employers' part to justify or buttress its illegal lockout. It is, to me, not a viable argument to say that this might happen, when we have testimony indicating that it won't happen. If they could have shown that there was this kind of action and that they were in jeopardy of having this kind of thing occur, perhaps, they would have an argument based on what some arbitrator awards that have suggested that where there is eminent strike danger or picketing danger that would bring them down unexpectedly, that kind of argument has been adopted today.

But we don't have that kind of situation. We have just the contrary of that situation, where meat cutters have come to these places, they have been told to go away and we have assurances from the chief negotiator of the meat cutters that this was not to happen. Under these circumstances, it seems to me, even more so, that a violation of the no lockout provision

[110]

has occurred.

Mr. Katz: I just have a comment or two that I would like to throw at you, Mr. Gill. I am happy to and I formally appraise Howard's statement and position as equally applicable to 1357.

But it would seem to me that what we really have are two horns of a dilemma; either he is totally 100 percent correct in his analysis—and I believe he is—or Bob Kleeb's statements on behalf of the markets as to the "motivation" actually supplies the contention that both he and Bob Bray are making as to how you define the lockout.

Now, as I read the lockout itself, it contractually relates——

The Arbitrator: I'm sorry. I missed one word. I am trying to follow you. You say that their statements supply the contention?

Mr. Katz: Yes. Hear me out.

The Arbitrator: Okay, go ahead.

Mr. Katz: Supply, they actually did.

As I understand what they are saying within the context of their argument—which I don't think is really responsive to ours—but within the

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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-708.

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL,

Petitioner,

v.

RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCALS 1349, 1358, 1360, 1361, 1371 and 1393,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Retail Clerks International Association Locals 1349, 1358, 1360, 1361, 1371 and 1393 submit this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by the Philadelphia Food Store Employers' Labor Council. Respondents respectfully request that the Court deny the petition for the reasons stated herein.

COUNTERSTATEMENT OF THE QUESTION PRESENTED.

Should this Court burden its already swollen docket by undertaking to amplify upon the well-settled principles of judicial review of labor arbitration awards set forth in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960), on the basis of a spurious "conflict" among decisions of the several courts of appeals in the application of *Enterprise Wheel's* "essence test" in the context of a case decided in total conformity with those principles which has a factual setting so idiosyncratic that the precedential value of any ruling by this Court would be minimal at best.

COUNTERSTATEMENT OF THE CASE.

Respondents respectfully refer the Court to the opinion of the Court of Appeals herein for an accurate portrayal of the relevant facts of this case and the rulings of the District Court and the arbitrator. A5-7.

Moreover, respondents strongly take exception to the unfairness of the factual presentation made by petitioner to this Court concerning the alleged "agreement" between the parties that a finding of "offensive employer action" was required before the arbitrator could rule that the store

closings constituted a lockout. Petitioner has again here, as it did in the courts below, disregarded the context and intended meaning of language by seizing upon the parties' coincident use of the words "offensive employer action" in their briefs to the arbitrator as the basis for the claimed existence of an agreement between the parties, said to be in the nature of a joint submission agreement, which the arbitrator disregarded in making his ruling in favor of respondents. The best that can be said about petitioner's factual presentation to this Court is that it is less disingenuous than that made to the Court of Appeals, where petitioner characterized what it now calls an "agreement" as a stipulation between the parties. That claim was so devoid of factual support that the Court of Appeals did not even deem it worthy of explicit rejection.

The truth of the matter is that the alleged "agreement" as to the elements of a lockout exists only in the mind of petitioner, whose perception is tainted to no small degree by wishful thinking. As the even most cursory reading of the respective briefs of Acme Markets and respondents to Arbitrator Gill reveals, the parties were in sharp dispute about just what constituted "offensive employer action," despite their common use of those words. Acme took the narrow view that an "offensive shutdown" was one undertaken as a bargaining weapon "for the purpose of securing economic concessions." A36. Respondents viewed the concept of an "offensive" shutdown more liberally, defining it succinctly in the last paragraph of their brief as a store closing undertaken "without economic justification," (A57), which would only exist if the supermarket could not be profitably operated without a meat department. Respondents argued to the arbitrator that no showing of such an economic justification could be made by the two supermarket chains.

As noted in the Court of Appeals' opinion, the arbitrator's analysis of the "lockout" issue submitted to him was essentially congruent with the approach proffered by respondents. A6. Just as respondents had argued that any shutdown without economic justification was "offensive employer action" and therefore a "lockout," the arbitrator reasoned that any store closings for other than economic reasons constituted "strategic" action by the food stores and therefore constituted a contractually-proscribed "lockout." Finding no economic justification on the record before him, the arbitrator concluded that the store closings were "strategic" and ruled that the two supermarket chains had breached their "no-lockout" promise to respondents by shutting down their operation and denying work to their Retail Clerk employees.

The arbitrator's analysis of the lockout issue substantially dovetailed with that advanced by respondents, although it concededly did not parrot it *in haec verba*. The respective definitions of "offensive employer action" utilized by petitioner and respondents in their briefs to the arbitrator were radically variant. To the extent there was any "agreement" in this case, there was a far greater degree of conceptual "agreement" on the definition of a "lockout" between respondents and the arbitrator than there was between respondents and the petitioner. Petitioner's claim that a *de facto* submission agreement was made between the parties is simply untenable on the record of this case. Hence, the question asserted to be at the core of this case is not truly presented at all. Despite the absence of the foundational fact of an actual agreement between the parties which limited the decisional authority of the arbitrator, petitioner has nevertheless attempted to manufacture such an agreement *ex nihilo* by strength of assertion in order to create a "cert-worthy" issue in this case where none exists.

REASONS FOR DENYING THE WRIT.

I. A Case Whose Disposition Turns on the Resolution of a Disputed Factual Issue Is Inappropriate for Review by This Court.

Petitioner's only cognizable claim of legal error which pertains to this particular case, as opposed to its wide-ranging attack on the Third Circuit's policy in reviewing arbitration awards, is its contention that the Court of Appeals erred in failing to defer to the factual finding of the District Court as to the arbitrator's disregard of the asserted mutual intent of the parties concerning the definition of a "lockout." Petitioner's complaint that the Court of Appeals "did not even bother to address" the validity of that finding and that its refusal to affirm same was tantamount to sanctioning the arbitrator's dispensation of "his own brand of industrial justice."

The ruling of the Court of Appeals herein of course permits no such result. The linchpin of petitioner's arguments is the existence of the "agreement" between the parties on the elements of a lockout. It was that alleged manifestation of the parties' intent which the arbitrator was found to have improperly disregarded by the District Court. However, as demonstrated in the discussion of the facts of this case at the beginning of this brief, only by the most mechanical exaltation of form over substance can the District Court's finding of such an "agreement" be viewed as having even a scintilla of evidentiary support.

The decision of the Court of Appeals must be read as having reversed that finding by necessary implication. The appellate court specifically noted that the District Court had ruled that the arbitrator had ignored the intent of the parties respecting the interpretation of "lockout" as used in the collective bargaining agreement. A6. The Court of Appeals ruled, however, that the "*interpretation*

of [that] term was clearly within the scope of the issue submitted to the arbitrator * * *." A7 (emphasis added). No such conclusion would have been drawn by the Court of Appeals had it found any merit in the contention that an "agreement" between the parties precluded "interpretation" of the meaning of "lockout" by the arbitrator. The Court of Appeals must be viewed as having implicitly reversed the District Court's finding that the parties had "agreed" to a definition of "offensive employer action" which the arbitrator was bound to follow.

Few would seriously dispute the view that a labor arbitrator improperly exceeds his authority if he defies a stipulation or submission agreement made between the disputant parties. *Enterprise Wheel* has authoritatively resolved any doubts on that point and there has been no discernable trend in the Third Circuit or elsewhere toward judicial sanctioning of such arbitral overreaching. Assuming the undisputed existence of such an agreement in this case, there would be no need for this Court to undertake to expand upon the teachings of *Enterprise Wheel*, as the result would follow *a fortiori*. The only dispute in this case is over the issue of *whether any such agreement existed* between the parties. If one did not, the result below is undeniably correct; if one did, the result below should have differed. It is rather inappropriate to call upon the Supreme Court of the United States to step in to resolve what is no more than a factual dispute in a case which would be clearly controlled by well-settled law no matter which way that dispute came out. The disposition of such relatively insignificant issues is entrusted to the Courts of Appeals under the federal court system. The Third Circuit has acted to correct the error of the District Court herein and its decision adheres to the governing legal principles set forth by this Court. Its ruling herein should not be disturbed.

II. The Standards of Judicial Review of Labor Arbitration Awards in the Third Circuit Are Faithful to the Tenets of *Enterprise Wheel* and Are Not in Conflict With Those Employed in Other Circuits.

Because the issue presented by the case *sub judice* is unlikely to attract the interest of this Court, petitioner has attempted to enhance its chances of securing review in this Court by attacking the "policy" of the Third Circuit regarding enforcement of labor arbitration awards as manifesting an infidelity to *Enterprise Wheel* and as conflicting with the "policies" of the Fourth and Sixth Circuits. Petitioner has been admirably forthright in conceding that this alleged conflict is not a "classic" one. Respondents submit, however, that the alleged conflict among the circuits in their standards of judicial review of labor arbitration awards does not exist at all.

The Third Circuit's decision in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3d Cir. 1969), is perhaps the most comprehensive and searching analysis of *Enterprise Wheel* and other decisions relating to judicial review of arbitration awards undertaken by a Court of Appeals. It is, of course, the seminal case on the subject in this circuit and has spawned numerous progeny. *See, e.g., Teamsters Local Union No. 30 v. Helms Express Inc.*, 591 F. 2d 211 (3d Cir. 1979); *Teamsters Local 249 v. Western Pennsylvania Motor Carriers Ass'n.*, 574 F. 2d 783 (3d Cir. 1978); *N. F. & M. Corp. v. United Steelworkers*, 524 F. 2d 756 (3d Cir. 1975); *Amal. Meatcutters v. Cross Bros.*, 518 F. 2d 1113 (3d Cir. 1975); *Local 103, I. U. E. v. RCA Corp.*, 516 F. 2d 1336 (3d Cir. 1975). Each of these cases has, like *Ludwig Honold*, faithfully applied the principles of *Enterprise Wheel* to the particular case before the court. Indeed it is noteworthy that the two Sixth Circuit cases cited by petitioner as sharply divergent in approach

from *Ludwig Honold* both cite to *N. F. & M. Corp., supra*, as supporting authority for their holdings. *See Storer Broadcasting Co. v. AFTRA*, 600 F. 2d 45, 47 (6th Cir. 1979); *Detroit Coil v. IAM etc.*, 594 F. 2d 575, 579 (6th Cir. 1979). The decision in *N. F. & M. Corp., supra*, was one which took a very "restrictive" approach to judicial disturbance of labor arbitration awards and in so doing followed *Enterprise Wheel* and *Ludwig Honold* quite literally. *See* 524 F. 2d at 759-760.

Moreover, the allegedly conflicting decisions of the Fourth and Sixth Circuits are perfectly correct applications of *Enterprise Wheel's* guidelines to the rather egregious examples of abuse of authority by the arbitrators in those cases. The Third Circuit would without doubt have reached identical results under *Ludwig Honold* had those cases arisen within its jurisdiction. *Storer Broadcasting Co., supra*, involved factual determinations by an arbitrator which had no evidentiary support whatsoever in the record before him. In *Detroit Coil Co., supra*, the challenged rulings of the arbitrator lacked any evidentiary support and contravened clear contractual mandate. The latter defect was also fatal to the arbitration awards in *Drivers' Local 89 v. Hays and Nicoulin, Inc.*, 594 F. 2d 1093 (6th Cir. 1979) and *Monongahela Power Co. v. IBEW*, 566 F. 2d 1196 (4th Cir. 1976), where the arbitrators sought to substitute their judgment on matters reserved to managerial prerogative. In *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F. 2d 95 (4th Cir. 1979) and *Westinghouse Electric Corp. v. IBEW, Local 1805*, 561 F. 2d 521 (4th Cir. 1977), the arbitration awards were overturned because the applicable collective bargaining agreements did not provide for the awarding of punitive damages for their breach.

The scrutiny of the merits of the arbitration awards undertaken by the Fourth and Sixth Circuits in these cases

was not nearly so penetrating as petitioner's laudatory characterizations would have the Court believe. Indeed, those courts could not engage in any review of the merits beyond the "essence test" without running afoul of *Enterprise Wheel*. Contrary to petitioner's interpretation of those cases, the opinions of the respective courts of appeals therein certainly do not represent any vanguard approach to the judicial review issue nor do they reveal any significant analytic departure from *Ludwig Honold* and its progeny. Those cases, like the instant one, turned on their idiosyncratic facts as measured in light of the controlling principles of *Enterprise Wheel*. The perhaps fortuitious fact that more aberrant arbitration awards have been rendered and reversed in the Fourth and Sixth Circuits than in the Third Circuit hardly demonstrates that the Third Circuit has lapsed into a judicial coma in recent years, as petitioners seem to suggest.

In the absence of any true conflict among the circuit courts of appeals on the issue of the proper standards for judicial review of labor arbitration awards within the meaning of Supreme Court Rule 19(1)(b), respondents respectfully submit that this Court need not and should not accept this case for review.

CONCLUSION.

Respondents respectfully submit that this Court should deny the petition for a writ of certiorari.

Respectfully,

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In The

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October Term, 1979

NO. 79-708

PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL,

Petitioner,

VS.

RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCALS 1349, 1357, 1358, 1360, 1361, 1371 and 1393,

Respondents.

BRIEF OF LOCAL 1357 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Respondents, Retail Clerks International Association, Local 1357, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Third Circuit's decision in this case for the reasons stated herein.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should not this Court deny certiorari where there is no real conflict between the Circuits as to the application of the standards of judicial review of labor arbitration awards set forth in United States Steelworkers vs. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960), and where the decision below was rendered in absolute conformity with those principles, the Petition in this case being in fact nothing more than a request to review alleged errors in the decision below.

COUNTERSTATEMENT OF THE CASE

The underlying action was brought by the Petitioners in the United States District Court for the Eastern District of Pennsylvania pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C., §185, to vacate an arbitration award issued by Arbitrator Lewis M. Gill, issued in response to an expedited grievance and arbitration procedure filed by the Union Respondents herein. The grievance contended that the shutdown of the Acme and A & P facilities as a result of a labor dispute between Acme, A & P and Food Fair, which constituted the Philadelphia Food Store Employers Labor Council and another Union, the Meatcutters, was a lockout of the Retail Clerk employees.

On or about March 6, 1977, a strike was called against Food Fair by the Meatcutters Retail Joint Council of Philadelphia and Vicinity, which was negotiating a new Contract with A & P, Acme and Food Fair, participating members of the Philadelphia Food Store Employers Labor Council which was negotiating with the Meatcutters as a multi-employer bargaining unit. The dispute with the Meatcutters

came about as a result of the expiration of their Collective Bargaining Agreement. The Meatcutters announced that their strike action would only be against Food Fair, but even though the Employers were aware of that situation, and although no strike action by the Meatcutters occurred at Acme and A & P, on or about March 9, 1977, Acme and A & P also closed down their stores locking out not only their employees in the Meatcutters bargaining unit, but locking out the employees in the Retail Clerks bargaining unit as well. The Retail Clerks employees had in fact honored the picket lines of the Meatcutters at Food Fair, but were fully prepared, ready and willing to continue working at Acme and A & P. At the time that Acme and A & P shut down their stores locking out all of their employees, the Contract between the Retail Clerks and the Employers was in full force and effect (not expiring until January 21, 1978), that Contract giving the Retail Clerks the right to respect the picket lines of another Union at the stores without it being considered a violation of the Contract. It is also clear that no dispute existed on March 9, 1977, between the Retail Clerks and any of the Companies.

The issue of whether or not Acme and A & P violated the no lockout provision of the Council's Agreement with the Retail Clerks by closing their stores on March 9, 1977, refusing to allow not only their Meatcutters, but also their Retail Clerk employees to work was submitted to expedited arbitration pursuant to the Collective Bargaining Agreement. In accordance with the terms of the submission, the arbitrator issued an award finding that A & P and Acme had locked out the Retail Clerks Union by closing their stores on March 9, in violation of the no lockout provision of the Retail Clerks Agreement with A & P and Acme.

The District Court in the 301 action brought by the Food Stores to set aside the arbitration award, overturned the arbitration award finding that the arbitrator had disregarded the intent of the parties in structuring the definition of the term "lockout" (which is undefined in the Contract) and on the ground that the award was in manifest disregard of the law because of what the Court considered the inappropriateness of that definition.

On appeal, the United States Court of Appeals for the Third Circuit reversed the decision of the District Court, reinstating the

award of the arbitrator, recognizing that the term "lockout" was not defined in the Collective Bargaining Agreement between the parties and that the interpretation and definition of that term was the issue submitted to the arbitrator for determination. There was at no time in any stage of these proceedings any agreement between the parties either by stipulation or otherwise, as to the definition of the term "lockout" or that a finding of "offensive employer action" was required before the arbitrator could rule that the action of the Petitioner herein constituted a lockout.

Since this failure of the Court below to enforce this alleged understanding between the parties as to the meaning of this term in reversing the District Court and upholding the award of the arbitrator is such an essential part of the Petition in this case, it must be categorically pointed out that throughout the proceedings before the arbitrator, it was the position of the Unions that the Contract language was clear and unequivocal and that it allowed for no exceptions or defenses. The Unions steadfastly held to their position that as long as the Employers denied work from their employees covered under the Collective Bargain-

ing Agreement, that that was sufficient to constitute a lockout under the Contract requiring an award in favor of the Unions without regard to a determination as to whether there was any offensive or defensive conduct on the part of the Employer against the affected employees. The arbitrator in fact held in a well reasoned decision, supported by not only logical interpretation of the Collective Bargaining Agreement, but by reliance on other arbitration decisions, that the withholding of work from the Retail Clerks was in fact a lockout in violation of the Contract between the parties.

All arguments concerning the existence of some agreement or understanding between the parties as to the definitional elements of the term "lockout" which give rise to the Petitioner's argument that the court below failed to look to the intention of the parties in deciding the case, were considered by the Court of Appeals and were rejected. The Court of Appeals found essentially that there was no understanding between the parties, either contractually or otherwise, as to the definition of the term and that it was that definition or interpretation which was the issue which the parties had in fact submitted to the arbitrator for determination.

It is respectfully submitted that it was that determination and the upholding of that determination by the Court of Appeals, which is the basis for this Petition and not any dispute or conflict with decisions of other Courts of Appeals.

REASONS FOR DENYING THE WRIT

I. WHERE THERE IS IN FACT NO CONFLICT BETWEEN DECISIONS OF COURTS OF APPEALS ON THE ISSUE OF ENFORCEMENT OF ARBITRATION AWARDS, AND WHERE IN FACT THE COURT BELOW FOLLOWED STANDARDS ESTABLISHED BY THIS COURT FOR THE JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS, THERE IS NO ISSUE PRESENTED TO THIS COURT APPROPRIATE FOR REVIEW.

The Petitioner in this case has attempted to fabricate a reviewable issue by attempting to convince this Court that the arbitrator failed to adhere to the alleged mutual intent of the parties with regard to the definition of the term "lockout" and by alleging that the approach of the Court of Appeals in reviewing that award was based on a standard of review which is in conflict with standards annunciated by this Court and by other Courts of Appeals.

As we have indicated above, the alleged agreement between the parties as to the definitional elements of a lockout, never in fact existed in this case and was in actuality the issue submitted to the arbitrator for determination. This was precisely the finding of the Court of Appeals in its decision, when, following the standards of judicial review which are applied in the Third Circuit, it upheld the determination of the arbitrator in this case that there had in fact been a lockout in violation of the Collective Bargaining Agreement between the parties.

If there had been such an agreement, there is no question but that the failure of the arbitrator to adhere to that understanding would have been in clear violations of the principles annunciated in the Enterprise Wheel and Car Corp. case, supra, requiring the setting aside of that award by the Court of Appeals for the Third Circuit in accordance with its own standards for review of labor arbitration awards as enunciated in the case of Ludwig Honold Manufacturing Company vs. Fletcher, 405 F.2d 1123 (3rd Cir. 1969). That factual dispute, however, was effectively put to rest by the decision of the Court below in essentially finding that there

had been a lockout in violation of the Contract between the parties, drew his decision from the "essence" of the Contract as required by Enterprise Wheel and Car Corp. case standards.

A review of Supreme Court Rule 19 establishes that unless a case raises issues which essentially meet the criteria contained in that Rule (even though the reasons stated in the Rule are neither controlling or fully measuring the Court's discretion), would not give rise to issues appropriately reviewable by this Court. The determination of that factual dispute was appropriately before the Federal Courts below and was decided finally and properly by the Court of Appeals. Had they decided the factual issue to the contrary, there is no question but that under the Third Circuit standards, the District Court decision to set aside would have been upheld just as those same standards required the upholding of the award when the factual dispute was resolved in favor of a finding that there was no agreement between the parties on the issue in question. Such a dispute was appropriately before the Federal Courts below and respectfully, does not raise an issue for review by this Court.

The only remaining basis which the Petitioner presents to this Court as justification for the grant of the Petition, is the allegation that the standard enunciated by the Court of Appeals in this case in reviewing labor arbitration awards is in conflict with standards utilized in other Courts of Appeals. Essentially, the Third Circuit in fulfilling its obligations of review of labor arbitration awards, pursuant to the guidelines established by this Court in the Enterprise Wheel case, formulated a standard of review in the Ludwig Honold Manufacturing Company case, supra, which has been followed by this Circuit faithfully since its inception. That standard generally states that if the contractual interpretation by the arbitrator can be derived in any rational way from the agreement, viewed in the light of its language, context and any other indicia of the parties' intention, the award must be upheld. Further, the Court's guidelines establish that only where there is a manifest disregard of the agreement, unsupported by principles of contract construction and the law of the shop may the award be set aside. Ludwig Honold Manufacturing Company, supra.

It is respectfully submitted that this standard fully complies with the guidelines established by this Court for review of labor arbitration awards, and is in essence the standard utilized universally by Federal Courts in dealing with these issues. In fact, virtually every Circuit has adopted standards similar to, if not exactly the same, as those of the Third Circuit with regard to judicial review of arbitration awards, all of which are consistent and are derived from the standards enunciated by this Court in the Enterprise Wheel and Car case, supra.[1]

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1. See I.U.E. vs. Peerless Pressed Metal Corp., 489 F.2d 768 (1st Cir. 1973); Saxis S.S. Co. vs. Multifacs International Traders, Inc., 357 F.2d 577 (2d Cir. 1967); International Union of District 50, United Mineworkers of America vs. Bowman Transportation, Inc., 421 F.2d 934 (5th Cir. 1970); Mogge vs. District 8 International Association of Machinists, 454 F.2d 510 (7th Cir. 1971); Barrett vs. Manufacturer's Railway Company, 453 F.2d 1305 (8th Cir. 1972); Holly Sugar Corp. vs. Distilling Rectifying, Wine and Allied Workers, International, 412 F.2d 899 (9th Cir. 1969); Amalgamated Butcher Workmen's Local No. 641 vs. Capitol Packing Co., 413 F.2d 688 (10th Cir. 1969); Washington-Baltimore Newspaper Guild, Local 35 vs. Washington Post Co., 442 F.2d 1234 (D.C. Cir. 1971).

It is submitted that there are in fact no conflicts on this matter of law in any of the Circuits and specifically, no conflicts between the standards utilized in the Third Circuit and those utilized in the Fourth and Sixth Circuits. In fact, a review of the decisions cited by the Petitioner in an attempt to establish this conflict confirms not that there is a conflict, but rather that there is a universal standard applied in all the Circuits and that any differences in application are based merely on the factual situations in the cases before the Courts for review as opposed to any differences in the legal standards utilized by the Courts in reaching their decisions.

In fact, it must be noted that in at least two (2) of the Sixth Circuit cases cited by the Petitioner as examples of the alleged conflict in the Circuits, both cite a Third Circuit case, N.F. & M. Corp. vs. United Steelworkers, 524 F.2d 756 (3rd Cir. 1975)., in support of their decisions in those cases. Storer Broadcasting Co. vs. AFTRA, 600 F.2d 45 (6th Cir. 1979); Detroit Coal Co. vs. Machinists Lodge 82, 594 F.2d 575 (6th Cir. 1979).

Further, the approach of the Courts in all of the other decisions cited in both the Fourth

and Sixth Circuits, apply the same Enterprise Wheel standards in the judicial review of those arbitration awards as are applied in the Third Circuit in the Ludwig Honold case and its progeny. It is submitted that had factual situations such as those in the Fourth and Sixth Circuits cases been presented to the Third Circuit, that under the Ludwig Honold test, similar results would have been reached.

Since Petitioner has not established a real conflict among the Circuit Courts with regard to the standards to be applied in the judicial review of arbitration awards, it is respectfully submitted that the criteria of Rule 19 have not been met and that certiorari should not be granted in this case.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By_____

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